Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

UNCLASSIFIED | CONFIDENTIAL | SECRET

CENTRAL INTELLIGENCE AGENCY

OFFICIAL ROUTING SLIP

TO	NAME AND ADDRESS	DATE	INITIALS
1	A/DCI 7D6011 7/19/62 1300	9/21/62	
2	OGC/LC		
3			
4			
5			
6			

	ACTION		DIRECT REPLY		PREPARE REPLY
	APPROVAL		DISPATCH		RECOMMENDATION
	COMMENT		FILE		RETURN
	CONCURRENCE		INFORMATION		SIGNATURE

Remarks: Attached for information is an interesting discussion on the House floor concerning termination authority for NSA similar to 102(c) for the Agency. There are several references to the Agency authority and court tests of this authority.

STAT

John S. Warner
Legislative Counsel

FOLD HERE TO RETURN TO SENDER

FROM: NAME, ADDRESS AND PHONE NO.	DATE
Legislative Counsel, 7D01	18 Sep 62

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

UNCLASSIFIED | CONFIDENTIAL | SECRET

FORM NO. 2-61 237 Use previous editions (40)
* U.S. GOVERNMENT PRINTING OFFICE : 1961 O—587282

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

be set by the Board, or limitations could be set based on an amount per unit rather than per room. This could be done provided, of course, that the amounts so set would compare favorably with those prescribed under FHA.

Therefore, Mr. Speaker, I consider this to be excellent and most timely legislation, and I urge that it be enacted into law.

Mr. Speaker, I have before me a letter written by the Chairman of the Federal Home Loan Bank Board, Mr. McMurray. It is addressed to me.

SEPTEMBER 17, 1962.

Hon. WRIGHT PATMAN,
Committee on Banking and Currency,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN PATMAN: In response to your oral request of today, the Federal Home Loan Bank Board advises that it favors the enactment of H.R. 13044 of the present Congress, a bill to amend the Home Owners' Loan Act of 1933 and the Federal Home Loan Bank Act, in the form in which the bill has been favorably reported by the Committee on Banking and Currency of the House of Representatives.

Time does not permit the obtaining of advice from the Bureau of the Budget with respect to this report. However, the proposal on which this legislation is based was submitted to the Bureau prior to the transmittal of the proposal to the Congress, and advice was received from the Bureau that there would be no objection from the standpoint of the administration's program to the transmission of that proposal to the Congress.

Sincerely yours,
JOSEPH P. MCMURRAY,
Chairman.

Mr. CLEM MILLER. Mr. Speaker, will the gentleman yield?

Mr. PATMAN. I yield to the gentleman from California.

Mr. CLEM MILLER. May I ask the chairman, In summary is it not true that this bill has as its object the need to bring our laws up to date with respect to the conditions of the housing industry? Because of the changing nature of the housing market our laws are no longer responsive to that market? The purpose of this bill is to do just this, to bring the laws into balance with the housing markets that now exist?

Mr. PATMAN. I agree with the gentleman. I think the word "modernize" would fit in there, to modernize the laws.

Mr. CLEM MILLER. Mr. Speaker, H.R. 13044 would permit Federal savings and loan associations to increase the portion of their total assets which may be invested in loans on multiunit properties. It would also broaden the authority of the Federal home loan banks so that they may make advances secured by mortgages on dwellings containing more than four units. Of course, this latter authority would affect all member institutions and not just Federal associations.

Under present law Federal savings and loan associations are permitted to lend on homes or upon combinations of homes and business properties without any restriction on the proportion of their assets invested in such loans provided such properties are physically located within a 50-mile radius from their home office. This power is further qualified by a $35,000 limit on a loan on any one property. The law presently provides for several exceptions to the investment limitations which I have just enumerated, namely the dollar limitation and 50-mile limitation.

The first exception provides that 20 percent of the association's assets may be loaned on other improved real estate without regard to the two limitations—$35,000 and the 50-mile limit. Of course, the loans must be secured by first liens on such property. It is this exception upon which our Federal associations' power to make loans on structures containing five or more dwelling units is based.

The second exception provides that Federal associations may use 20 percent of its assets for participating in first liens on one- to four-family homes without regard to the 50-mile limit.

These two exceptions are qualified, however, by existing law which provides that the aggregate sums invested pursuant to the two exceptions may not exceed 30 percent of the assets of the association. Consequently, insofar as multifamily housing with five or more units is concerned, a Federal association has a theoretical limit of 20 percent of its assets on such type of investment. This theoretical limit is subject to curtailment if it has more than 10 percent of its loans in participations in loans on one- to four-family units outside its regular lending area, has loans of more than $35,000 on residential property or other improved real estate within its lending area, or has loans, without participation by another institution, on one- to four-family structures outside its regular lending area. The net effect of these several competitive types of assets is to reduce the so-called 20-percent authority substantially below 20 percent for a good many associations.

Mr. Speaker, the bill recognizes a basic change in the demand for housing which has been underway for several years. The committee was advised there has been a rapid acceleration in the demand for rental units of the apartment house type. We were informed that in 1954, for example, 7.3 percent of units covered by building permits in all reporting centers were in structures for five or more dwelling units. That in the same year, 8.8 percent of those units in metropolitan areas were in structures of five or more dwelling units. That by 1960, the percentage of permits covering units in structures with five or more dwellings increased to 18.7 percent nationally and 23 percent in metropolitan areas. We were further informed that last year, the ratios of the five or more unit group to the total units were 25.3 percent for the Nation and 30 percent for metropolitan areas. So far this year the five or more category is accounting for about 30 percent of all units covered by permits, and more than 35 percent of those units covered by permits in metropolitan areas we understand.

It is therefore most apparent that this legislation is necessary to keep pace with changes in the nature and character of the housing market. In accommodating to this change, it will encourage homebuilding of a superior sort in areas where there is genuine need and hence will be responsive to the purposes of the legislation. I then urge adoption of H.R. 13044.

Mr. WIDNALL. Mr. Speaker, will the gentleman yield?

Mr. PATMAN. I yield to the gentleman from New Jersey.

Mr. WIDNALL. The minority members of the committee fully support the proposal and feel it will be helpful in making additional loans possible for the multifamily unit type of housing. In the area I represent and many other areas there is much need to build multifamily housing.

The very nature of the community is changing, and changing very drastically from single family to multifamily units. This could provide a means for additional service by the savings and loan associations and additional loans that are badly needed in our areas.

Mr. Speaker, I fully support the bill and urge its passage.

(Mr. PATMAN asked and was given permission to revise and extend his remarks and include a letter.)

(Mr. CLEM MILLER asked and was given permission to revise and extend his remarks.)

Mr. DERWINSKI. Mr. Speaker, will the gentleman yield?

Mr. PATMAN. I yield to the gentleman.

Mr. DERWINSKI. I think it would be in order, if I asked the gentleman if in requesting this legislation, did not officials of the Federal Home Loan Bank Board indicate they would use a great deal of discretion and thought before they extended the limitation to a much greater percentage.

Mr. PATMAN. I agree with the gentleman.

Mr. DERWINSKI. I would merely wish to make the point for the RECORD that, obviously, an operation of this nature without any limitation would not be healthy for the savings and loan industry, and I think it would be a point well taken for the officials of the Federal Home Loan Bank Board not to interpret our action as permitting unlimited investments by savings and loan associations for industrial or multifamily units, but that they should still concentrate on the residential home market.

Mr. PATMAN. I am sure the Board will keep that in mind.

The SPEAKER pro tempore. The question is, Will the House suspend the rules and pass the bill, H.R. 10344, as amended?

The question was taken; and (two-thirds having voted in favor thereof), the rules were suspended and the bill, as amended, was passed.

A motion to reconsider was laid on the table.

AMENDING INTERNAL SECURITY ACT OF 1950 TO PROVIDE MAXIMUM PERSONNEL SECURITY IN NATIONAL SECURITY AGENCY

Mr. WALTER. Mr. Speaker, I move to suspend the rules and pass the bill (H.

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

R. 12082) to amend the Internal Security Act of 1950 by adding thereto title IV establishing a legislative base for personnel security procedures in the National Security Agency.

The Clerk read as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Internal Security Act of 1950 is amended by adding at the end thereof the following new title:

"TITLE IV—PERSONNEL SECURITY PROCEDURES IN NATIONAL SECURITY AGENCY

"Regulations for employment security

"SEC. 401. Subject to the provisions of this title, the Secretary of Defense (hereafter in this title referred to as the 'Secretary') shall prescribe such regulations relating to continuing security procedures as he considers necessary to assure—

"(1) that no person shall be employed in, or detailed or assigned to, the National Security Agency (hereafter in this title referred to as the 'Agency'), or continue to be so employed, detailed, or assigned; and

"(2) that no person so employed, detailed, or assigned shall have access to any classified information;

unless such employment, detail, assignment, or access to classified information is clearly consistent with the national security.

"Full field investigation and appraisal

"SEC. 402. (a) No person shall be employed in, or detailed or assigned to, the Agency unless he has been the subject of a full field investigation in connection with such employment, detail, or assignment, and is cleared for access to classified information in accordance with the provisions of this title; excepting that conditional employment without access to sensitive cryptologic information or material may be tendered any applicant, under such regulations as the Secretary may prescribe, pending the completion of such full field investigation: *And provided further,* That such full field investigation at the discretion of the Secretary need not be required in the case of persons assigned or detailed to the Agency who have a current security clearance for access to sensitive cryptologic information under equivalent standards of investigation and clearance. During any period of war declared by the Congress, or during any period when the Secretary determines that a national disaster exists, or in exceptional cases in which the Secretary (or his designee for such purpose) makes a determination in writing that his action is necessary or advisable in the national interest, he may authorize the employment of any person in, or the detail or assignment of any person to, the Agency, and may grant to any such person access to classified information, on a temporary basis, pending the completion of the full field investigation and the clearance for access to classified information required by this subsection, if the Secretary determines that such action is clearly consistent with the national security.

"(b) To assist the Secretary and the Director of the Agency in carrying out their personnel security responsibilities, one or more boards of appraisal of three members each, to be appointed by the Director of the Agency, shall be established in the Agency. Such a board shall appraise the loyalty and suitability of persons for access to classified information, in those cases in which the Director of the Agency determines that there is a doubt whether their access to that information would be clearly consistent with the national security, and shall submit a report and recommendation on each such a case. However, appraisal by such a board is not required before action may be taken under section 14 of the Act of June 27, 1944, chapter 287, as amended (5 U.S.C. 863), section 1 of the Act of August 26, 1950, chapter 803, as amended (5 U.S.C. 22–1), or any other similar provision of law. Each member of such a board shall be specially qualified and trained for his duties as such a member, shall have been the subject of a full field investigation in connection with his appointment as such a member, and shall have been cleared by the Director for access to classified information at the time of his appointment as such a member. No person shall be cleared for access to classified information, contrary to the recommendations of any such board, unless the Secretary (or his designee for such purpose) shall make a determination in writing that such employment, detail, assignment, or access to classified information is in the national interest.

"Termination of employment

"SEC. 403. (a) Notwithstanding section 14 of the Act of June 27, 1944, chapter 287, as amended (5 U.S.C. 863), section 1 of the Act of August 26, 1950, chapter 803, as amended (5 U.S.C. 22–1), or any other provision of law, the Secretary may terminate the employment of any officer or employee of the Agency whenever he considers that action to be in the interest of the United States, and he determines that the procedures prescribed in other provisions of law that authorize the termination of the employment of that officer or employee cannot be invoked consistently with the national security. Such a determination is final.

"(b) Termination of employment under this section shall not affect the right of the officer or employee involved to seek or accept employment with any other department or agency of the United States if he is declared eligible for such employment by the United States Civil Service Commission.

"Definition of classified information

"SEC. 404. For the purposes of this section, the term 'classified information' means information which, for reasons of national security, is specifically designated by a United States Government agency for limited or restricted dissemination or distribution.

"Nonapplicability of administrative procedure act

"SEC. 405. The Administrative Procedure Act, as amended (5 U.S.C. 1001 et seq.), shall not apply to the use or exercise of any authority granted by this title.

"Amendments

"SEC. 406. (a) The first sentence of section 2 of the Act of May 29, 1959 (50 U.S.C. 402 note), is amended by inserting ', without regard to the civil service laws,' immediately after 'and to appoint thereto'.

"(b) Subsection (b) of section 2 of the Performance Rating Act of 1950 (5 U.S.C. 2001(b)) is amended—

"(1) by striking out the period at the end of paragraph (13) and inserting in lieu thereof a semicolon; and

"(2) by adding at the end thereof the following new paragraph:

"'(14) The National Security Agency.'."

The SPEAKER pro tempore. Is a second demanded?

Mr. JOHANSEN. Mr. Speaker, I demand a second.

Mr. LINDSAY. Mr. Speaker, I demand a second.

The SPEAKER pro tempore. Which gentleman is opposed to the bill?

Mr. LINDSAY. Mr. Speaker, I am opposed to the bill.

The SPEAKER pro tempore. The gentleman from New York qualifies.

Without objection, a second will be considered as ordered.

There was no objection.

The SPEAKER pro tempore. The gentleman from Pennsylvania [Mr. WALTER] will be recognized for 20 minutes, and the gentleman from New York [Mr. LINDSAY] will be recognized for 20 minutes.

The Chair recognizes the gentleman from Pennsylvania [Mr. WALTER].

Mr. WALTER. Mr. Speaker, the American people were shocked when they learned in early September 1960 that two U.S. citizens, employees of the National Security Agency—a supersecret intelligence agency of our Government—had denounced and vilified their native land at a press conference in Moscow. The two had been missing for over a month, having failed to return to the National Security Agency from a supposed vacation trip they had taken together.

Congress and the American people were concerned not only about the aid these two men had given the Soviet Union's "Hate America" propaganda campaign, but also about the information they had undoubtedly given Soviet officials concerning extremely sensitive intelligence operations of the U.S. Government. The incident was such that it sparked two congressional investigations and also, unquestionably, a resolve on the part of most Members of Congress that they must do everything humanly and constitutionally possible to prevent a recurrence.

A little over a month ago, the Committee on Un-American Activities released a report on the investigation of National Security Agency security practices which it had conducted as a result of the defection of William H. Martin and Bernon F. Mitchell to the Soviet Union. This report was based on 16 separate executive session hearings with NSA officials, employees and former employees, and also on an investigation which extended over a period of almost 2 years. The report revealed that extremely lax security procedures had been in effect at the National Security Agency at the time Mitchell and Martin were hired and even afterwards—when they defected and the investigation was launched.

Definite beneficial results, however, have been produced by the investigation. As a result of it, the NSA's directors of personnel and security have been dismissed. Twenty-six employees of the Agency have been released for reasons of sex deviation, and the entire security setup at NSA has been revamped. Shortly before the committee report was issued, the director of NSA submitted to me a list of 22 corrective measures which had been adopted by the Agency to improve and tighten its security procedures and to eliminate those practices which had made possible the hiring of two men who never should have been employed in classified work of any kind for the Government of the United States.

Mr. Speaker, those 22 corrective steps taken by NSA within recent months are basically the reason why we are now considering H.R. 12082. Certainly, it is our duty to see that the best possible security standards prevail in one of the most sensitive intelligence agencies of our Government, that the improved and

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

tightened procedures be maintained, and that there be no return to the laxity which formerly prevailed in the Agency and did so much harm to certain security operations of our country.

H.R. 12082 applies only to the National Security Agency. It does not touch any other agency of Government. The bill has the approval of the Department of Justice and the explicit recommendation of the Department of Defense which has jurisdiction over the NSA. There are no objections to the bill from the Civil Service Commission or the Bureau of the Budget.

What does the bill do?

Just a few things—but very important things.

First. It gives the Secretary of Defense statutory authority to prescribe such security procedures as he considers necessary to assure that no one shall be employed by, or detailed, or assigned to, the National Security Agency unless such employment, detail, or assignment is "clearly consistent with the national security."

Second. It bars the employment, detail, or assignment of anyone to the National Security Agency unless that person has been subjected to a full field or background investigation with, of course, favorable results. A full field or background investigation is the most thorough and comprehensive check in all security procedures. At the same time, this bill will permit conditional employment at NSA pending completion of a full field investigation, provided that access is not granted to sensitive cryptologic information. This conditional employment period would be utilized in the training of personnel under strict security safeguards.

Third. It establishes boards of appraissal to assist the Director of the National Security Agency in discharging his personnel security responsibilities. These boards will consider only cases of permanent or conditional employees about whom some question arises as to the suitability of their employment. If any doubt arises about persons who have applied for positions with NSA prior to their actual employment, that person simply is not hired by the Agency.

Fourth. It gives the Director of the National Security Agency the summary power to dismiss any employee of the Agency when he considers such dismissal to be in the interests of the United States. It provides, however, that he may exercise this summary power only after he has determined that the interests of national security preclude the utilization of the normal dismissal procedures which apply to all Federal employess.

Fifth. It exempts the National Security Agency from the provisions of the Civil Service Act of 1883, the Performance Rating Act of 1950, and the Administrative Procedures Act. The purpose of this is to prevent disclosure of classified and highly secret information about NSA's operations and personnel. Relative to this provision, I would like to point out that Congress has already provided in section 6 of Public Law 36, 86th Congress, that no law shall be construed to require the disclosure of any activity or function of the National Security Agency.

Mr. Speaker, there is nothing startling, completely new, or bizarre in this bill. It is in no way a departure from precedent.

Sixteen years ago, in the Atomic Energy Act of 1946, section 145(b), Congress took cognizance of the very sensitive nature of the Atomic Energy Commission and established certain standards for employment with it. There has been no question of the right of Congress to do this nor of its wisdom in doing so. I believe it is obvious that the National Security Agency, whose overall operations are even more highly classified than those of the AEC, deserves the same consideration from the Congress.

The Central Intelligence Agency, the Atomic Energy Commission, the Foreign Service and 10 other agencies of our Government, have already been exempted by statute from the provisions of the Performance Rating Act because of the sensitive nature of certain of their functions. The National Security Agency's operations are far more secret than those of these 13 other agencies, with the possible exception of the CIA.

Some questions has been raised about what is perhaps the most vital provision in the bill—the right of the Director to summarily dismiss any NSA employee in the interests of the United States.

The answer to this question is quite simple on both constitutional and practical grounds. Again, this is not the first time that Congress has taken the step of giving such authority to the director of an intelligence agency. The Civil Service Commission, in a letter dated March 21, 1962, expressing its views on H.R. 12082, stated that this dismissal authority appears to be substantially the same as that granted to the Director of the Central Intelligence Agency by section 102(c) of the National Security Act of 1947 (61 Stat. 495, 498; 50 U.S.C. 403(e)).

With regard to that statute, we wish to point out that recent judicial decisions have sustained dismissal actions taken by the Director of the Central Intelligence Agency in the interests of the United States, pursuant to the broad authority granted by section 102(c). See *Rhodes* v. *United States* (Ct. Cl. No. 341–60, Jan. 12, 1962); *Kochan* v. *Central Intelligence Agency* (Civil No. 2728–58, D.D.C., Aug. 11, 1959), which are cases exactly in point.

If the courts have found no objection to this power in the Director of the Central Intelligence Agency, certainly they will not find any if the same power is vested in the Director of the National Security Agency, an agency described by some as even more secret and sensitive than the CIA.

The most comprehensive study and review of this country's security problems and procedures ever made was that of the bipartisan, 12-member Commission on Government Security, established by the Congress in 1955, and on which I had the honor to serve. Among other things, this Commission gave careful consideration to security problems as related to the National Security Agency. In its June 21, 1957, report to the President and the Congress, it specifically recommended that the power of summary dismissal be given to the Director of the National Security Agency. It pointed out that the national security interests committed to the care of the National Security Agency were so great and the consequences of error could be so devastating that the NSA should be given "extraordinary authority and powers" and, on the question of summary dismissal, should be given authority to deviate from the uniform loyalty program the Commission proposed for all Federal employees.

Mr. Speaker, this is what the Department of Defense itself says of the NSA:

> The Agency is faced with enormous security responsibilities. The missions assigned to the Agency seek to fulfill basic requirements of our national security. All activities conducted by NSA to carry out these missions are highly classified. Disclosure of the nature of these activities or portions of them could seriously impair the success of the Agency's efforts. Despite separation of tasks into work compartments and other precautions, the large majority of personnel of the Agency by virtue of their duties are exposed to, or have access to, uniquely sensitive information. The improper use, handling, or disclosure of this information could have adverse effects upon the national security.

I submit that if, in an agency of this type, the director is not given summary power of dismissal, then there can be no real security in the agency. The Congress has recognized the need for this authority in the CIA. It should, therefore, recognize the need for it in the National Security Agency.

H.R. 12082 gives each one of us the opportunity to help insure the security of 185 million Americans by seeing to it that there is real security in the agency they have designated to carry out one of the most sensitive operations of the very real war in which we are now engaged for the preservation of our freedom. It deserves the affirmative vote of every Member of this House.

Mr. LINDSAY. Mr. Speaker, I yield 5 minutes to the distinguished gentleman from California [Mr. COHELAN].

(Mr. COHELAN asked and was given permission to revise and extend his remarks.)

Mr. COHELAN. Mr. Speaker, I rise today as a kind of friend of the court. Originally it was not my intention to get into this debate, but in reviewing the bill I have become keenly aware of the problems that are inherent in working out procedures in this very, very difficult area. And may I say that insofar as the work of the committee of the distinguished gentleman from Pennsylvania [Mr. WALTER] is concerned, with reference to security problems; they have demonstrated the need for tightening security measures in this agency.

I hold with many authorities in this freedom-security field who say that only those who are ignorant can sneer at the

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

problems of security in the free world; that it is not enough to shout slogans whether of security or freedom; that what is required is creative intelligence to devise just and effective procedures which will protect the free cultures of the world from their hidden enemies without making less free those who are not its hidden enemies.

As many of you know, in my district we have a great university and a great law school. The distinguished dean of our law school has recently written an article in the California Law Review on "The Process of Prescribing Due Process."

I am in an awkward position here because I am not a lawyer but I am hoping that some of my lawyer colleagues will take due note of it. I would particularly call the article to the attention of the distinguished gentleman from Pennsylvania and his committee. Lawyers and members of the bench and bar, it seems to me, will in the long run be the professional people who are going to have to help us with this question of how we prescribe adequate due process procedures in this very complex area.

Mr. Speaker, it is my intention to put this complete article into the RECORD, and I commend it to all of you. Meanwhile I would like to quote briefly from it. The burden of Professor Newman's paper is this. He says:

> Our presumption is that modest reforms may be practicable, that the process of prescribing due process could be bettered.

Dean Newman goes on to say, in a passage which is particularly relevant to the problem before us:

> Yet without soaring into semantics or political theory could we not shun one view of "life, liberty, or property" that has caused much chaos? I refer to the hundreds, maybe thousands, of cases that protect "rights" but not "privileges," declaring that "due process of law is not applicable [with respect to Government employment, for instance] unless one is being deprived of something to which he has a right."

Dean Newman goes on to say:

> The due process clauses say nothing of right versus privilege. The chief vice of the privilege doctrine is that it has insulated us from a body of law, highly reputable, that seems designedly apt for protecting the freedoms that "life, liberty, or property" appears to imply. I refer now to the law of torts, and the successful handling there of all legal interests. The torts cases teach us that "property" means more than land and chattels and choses in action; "liberty," more than freedom from physical harm and imprisonment. Why should those cases have outpaced due process cases? Why in private suits for damages or an injunction should legal interests be protected that due process leaves helpless?

Mr. WALTER. Mr. Speaker, will the gentleman yield?

Mr. COHELAN. I am glad to yield to the gentleman from Pennsylvania.

Mr. WALTER. Mr. Speaker, I think in one word I can straighten the gentleman's thinking. Nobody has a right to the secrets of this Government. Nobody has a right to its secrets.

Mr. COHELAN. Yes, sir; and I would like to comment on that, as does Professor Newman in this article. He argues persuasively, it seems to me, that this "privilege" doctrine should be junked. He says:

> The privilege doctrine should be junked, and "life, liberty, or property" should be treated as a description of all legal interests. To the question, "Won't you still have to define that last phrase?" the answer is, "Of course."

But then he goes on—and this is very important:

> To pronounce that "liberty, or property," includes, say, reputational and emotional interests would not mean that governments no longer could deprive people of those interests, or that deprivations could be effected only by judicial trial. The requirement would merely be that due process be accorded.
>
> The kind of precise portrayal of harm that may crucially affect a lawsuit is exemplified by petitioner's brief in *Peters* v. *Hobby*. "We of course concede," said counsel, "that the Constitution does not limit the power of the executive summarily to terminate employment on secret information or for any other reason. The question before this Court is only whether the Government has the right to accompany a discharge with a finding of disloyalty which ruins the reputation and career of the accused, without a full hearing. In other words, the protested harm was not to job security but to one's repute as a prospective jobholder.

Mr. Speaker, I am constrained to oppose H.R. 12082 which would provide a legislative base for personnel security procedures in the National Security Agency. Indeed, as I understand the bill, it would provide in certain instances the total elimination of personnel security procedures.

Of course, I, like every Member of this House, have a proper and legitimate concern that the efficient and effective security measures be taken by the National Security Agency as well as in all other agencies to insure that there be no unauthorized disclosure of classified information which would in any way harm the security of the United States. However, we must be certain that we do not in the process forget that there are other values to be considered—and that a proper adjustment has to be made between the rights of American citizens and the National Security.

The report indicates that this legislation arose from a deplorable incident in 1960 when two NSA employees—B. F. Mitchell and W. H. Martin—disappeared behind the Iron Curtain. Their defection amply demonstrated the need for tightening up certain security measures of the agencies. As a result of a 13-month investigation by our House Committee on Un-American Activities a number of corrective changes in security procedures were indeed apparently put into effect. However, from all I can gather from the report, all of them related to defects exposed as a result of the Mitchell-Martin case which clearly indicate that this pair should never have been hired in the first place.

Let me say, therefore, with all of the emphasis at my command, I have absolutely no objection to section 402(a) which provides for full field investigations and evaluations. Clearly, if this had been in effect, the defactors Mitchell and Martin would not have been hired since all of the adverse information on them was apparently known by some investigative agency.

I think it would also be pointed out that at least one extremely sensitive agency, the AEC does accord hearing rights and procedural due process to applicants as well as employees.

Where H.R. 12082 goes astray, in my judgment, is in jumping from the proven necessity of tightening up security measures in the preemployment stage to the unproven assumption that national security demands giving authority to the Secretary of Defense to terminate summarily without any hearing whatsoever. This is set forth in the 403 which provides:

> The Secretary may terminate the employment of any officer or employee of the Agency whenever he considers that action to be in the interest of the United States, and he determines that the procedures prescribed in other provisions of law that authorizes the termination of employment of that officer or employee cannot be invoked consistently with the national security. Such a determination is final.

As the Washington Post said in a recent editorial August 20, 1962:

> This is the very definition of arbitrariness. It means that an employee could be discharged and disgraced on the basis of anonymous allegations without the slightest opportunity to defend himself—without any hearing at all and without any administrative review or even any judicial review of the decision. This would put everyone working for NASA at the mercy of any mischiefmaker or malcontent or personal enemy who might call him a subversive or a homosexual or an alcoholic. It would shatter morale in the Agency and impair rather than protect security and it would also shatter the basic principles of American justice.

We cannot ever forget the injustice to many Government employees which occurred during the 1950's under the loyalty-security programs as they were then operating in which individuals lost jobs, were unable to find other jobs, because their reputations were blackened.

As Justice Tom Clark said in the Supreme Court's unanimous opinion in *Wieman* v. *Updegraff*, 344 U.S. 183 (1952).

> There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy.

When we realize the tremendous damage which is visited on any Government employee who is dismissed on loyalty or security grounds, we want to be sure that the dismissal is not done unjustly. This bill would permit possible unjust summary dismissal based on the word of nameless accusers.

It denies to Government employees the most elementary features of due process—namely, the notice of charges and the right to confront and cross-examine the accusers.

My concern is not only that innocent people are unjustly accused and dismissed, but also that the agency itself will not be able to make an intelligent or rational decision without some form of hearing. Due process does not have meaning and value alone to the unjustly accused. It also is essential for an

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

institution or individual that makes the determination. This bill permits the wiping out of any procedure or due process in terminating employment with the National Security Agency. We must not forget that legislation passed today will not just be giving the authority to the present Secretary of Defense, Robert S. McNamara, a man for whom I have the highest respect and admiration, but also for all future Secretaries of Defense—and none of us can know who they might be.

Although I prefer to have no Government employee terminated without a full and fair hearing in every sense of those words, the bill could be improved in other ways. For example, section 402(c) of the bill as written provides that persons can be employed by the Agency prior to completion of their full field investigation so long as they do not have access to classified cryptologic information. Why, therefore, cannot an employee be set to such nonsensitive work during the course of a fair hearing on the charges against him? He could even be suspended during the hearing pending its completion. In any case, his access to sensitive material is cut off, but his rights to a fair hearing remain intact.

Although this bill purports to protect employment rights of any dismissed NSA employee to work for any other department or agency of the United States—as long as he is declared eligible by the Civil Service Commission, experience demonstrates that this is an illusory hope at best. If a person is dismissed by NSA he can just about give up hope of working for any other agency.

No one ever accused the late Supreme Court Justice Robert H. Jackson of subordinating national security to the rights of individuals. Yet, in one of his last addresses—Robert H. Jackson, "The Task of Maintaining our Liberties: The Role of the Judiciary," American Bar Association Journal, XXXIX, November 1953—he protested:

> We cannot approve any use of official powers or position to prejudice, injure or condemn a person in liberty, property, or good name, which does not inform him of the source and substance of the charge and give a timely and open-minded hearing as to its truth—safeguards without which no judgment can have a sound foundation.

Mr. Speaker, I have quoted from the excellent and penetrating article by Dean Frank Newman and I believe his full statement—particularly in reference to his comments on rights and privileges as they pertain to due process—deserve the full attention of our colleagues. In addition, the remarks by the distinguished attorney, Eleanor Bontecou, quoted from her book, "The Federal Loyalty-Security Program," Cornell University Press, 1953, speak directly to the problem before us today.

The statements follow:

THE PROCESS OF PRESCRIBING DUE PROCESS

(By Frank C. Newman, Professor of Law, University of California School of Law, Berkeley)

Recently we were told that the dueness of government procedure is not tested by "doctrinaire conception" or "loose generalities or sentiments abstractly appealing." Instead, "Whether the scheme satisfies those strivings for justice which due process guarantees, must be judged in the light of reason drawn from the considerations of fairness that reflect our traditions of legal and political thought, duly related to the public interest Congress sought to meet * * * as against the hazards or hardship to the individual that the * * * [attacked] procedure would entail." [1]

That is quite a mouthful. And no sooner were the words pronounced than a dissenting Justice retorted, "When we turn to the cases, personal preference, not reason, seems, however, to be controlling." Further, "Due process under the prevailing doctrine is what the judges say it is; and it differs from judge to judge, from court to court * * *. [It is] a tool of activitists who respond to their own visceral reactions in deciding what is fair, decent, or reasonable." [2]

Sanford Kadish has dissected the viewpoints those excerpts reflect,[3] and we will not refurbish his findings here. The intent of this article is to examine method rather than theory or result. We do not survey the rules of due process or query their correctness.[4] We do look at the process of prescribing those rules. We assess the prescribers' procedure, testing it for capacity to help insure correct rules. Our presumption is that modest reforms may be practicable, that the process of prescribing due process could be bettered.

Many of the ideas discussed here relate to *Hannah* v. *Larche*, decided by the Supreme Court in June 1960.[5] It deals with the due process rights of subpenaed witnesses. The U.S. Commission on Civil Rights, having received accusations that certain Louisiana registrars had deprived citizens of the right to vote, subpenaed those registrars to appear at a hearing and testify regarding the accusations. The registrars learned that the Commission would deny rights of apprisal, confrontation, and cross-examination; so their lawyers obtained a court order enjoining the Commission "from conducting the proposed hearing in Shreveport, La., whereby plaintiff registrars, accused of depriving others of the right to vote, would be denied the rights of apprisal, confrontation, and cross-examination." [6] The Supreme Court then vacated the injunction, ruling that in this kind of proceeding due process does not require that subpenaed witnesses be given those rights.

The opinions in *Hannah* v. *Larche* are a mine of information on the theory and practice of due process. They concern not merely an injunction in Louisiana and the subpenaed registrars whom it protected. Subpenaed witnesses generally are discussed—not only civil rights witnesses, but those called by all other executive and administrative officials, by grand juries, by legislative investigating committees, Federal and State. Specifically, the opinions have helped inspire these questions as to the process of prescribing due process.[7]

I. Should not the words of the due process clauses be reexamined for plain meaning?

II. Should not due process rights more consistently be classified and distinguished from other constitutional rights?

III. Would not an analytical checklist aid the deciding of cases?

IV. Who could spearhead reform, how?

I. THE WORDS OF THE DUE PROCESS CLAUSES SHOULD BE REEXAMINED FOR PLAIN MEANING

The fifth amendment declares, "No person shall * * * be deprived of life, liberty, or property, without due process of law." The 14th amendment (for our purposes here) is the same: "No State shall * * * deprive any person of life, liberty, or property, without due process of law." Those words are spongy and by themselves solve no problems. Quite a few problems might be eased, though, if the words were given full content. We pose two illustrations: (1) the privilege doctrine; (2) the too-pervasive criminal trial analogy.

A. The privilege doctrine

How should we read "life, liberty, or property"? "Liberty" has attracted probably the most attention, and no doubt needs more.[8] We are not even near the brave new world that might inhere in "life." (Does it mean only freedom from death? How about "the good life," or what for some people "begins at 40"?) Yet without soaring into semantics or political theory could we not shun one view of "life, liberty or property" that has caused much chaos? I refer to the hundreds, maybe thousands, of cases that protect "rights" but not "privileges," declaring that "due process of law is not applicable [with respect to government employment, for instance] unless one is being deprived of something to which he has a right." [9] I refer also to *Hannah* v. *Larche*, where the Court stated that the Civil Rights Commission "does not make determinations depriving anyone of his life, liberty, or property * * * and cannot take any affirmative action which will affect an individuals' legal rights." [10] When the facts that were before the Court are examined, when we see that the Commission—pursuant to congressional command—can and does sponsor publicity that may defame, degrade, and incriminate people, what the Court seems to have said is that governments, by derogatory publicity, do not affect "liberty, or property."

The due process clauses say nothing of right versus privilege. The chief vice of the privilege doctrine is that it has insulated us from a body of law, highly reputable, that seems designedly apt for protecting the freedoms that "life, liberty, or property" appears to imply. I refer now to the law of torts, and the successful handling there of all legal interests. The torts cases teach us that "property" means more than land and chattels and choses-in-action; "liberty,"

---

[1] Frankfurter J., concurring in *Hannah* v. *Larche*, 363 U.S. 420, 487 (1960).

[2] Douglas, J., id. 505–506.

[3] Kadish, "Methodology and Criteria in Due Process Adjudication—A Survey and Criticism," 66 Yale L. J. 319 (1957).

[4] "While Justice Cardozo in 1937 felt able to find the 'rationalizing principle' which gave 'proper order and coherence' to the determinations made up to that time, the array of apparently disordered determinations since that date would no doubt give pause to one contemplating a similar effort today." Kadish, "A Case Study in the Signification of Procedural Due Process—Institutionalizing the Mentally Ill," 9 W. Pol., Q. 93 (1956).

[5] 363 U.S. 420 (1960); 74 Harv. L. Rev. 120 (1960).

[6] 363 U.S. at 429 n. 11.

[7] The opinions are criticized in Newman, "Due Process, Investigations, and Civil Rights."

[8] E.g., see Nutting, "The Fifth Amendment and Privacy," 18 U. Pitt L. Rev. 533 (1957); Shattuck, "The True Meaning of the Term 'Liberty' in those Clauses in the Federal and State Constitutions which Protect 'Life, Liberty, and Property,'" "4 Harv L. Rev. 365 (1891); Hand "The Bill of Rights" 51 (1958) ("Liberty not only includes freedom from personal restraint, but enough economic security to allow its possessor the enjoyment of a satisfactory life."); *Palko* v. *Connecticut*, 302 U.S. 319, 327 (1937) ("liberty of the mind as well as liberty of action").

[9] *Bailey* v. *Richardson*, 182 F. 2d 46, 58 (D.C. Cir. 1950), affirmed, 341 U.S. 918 (1961).

[10] 363 U.S. at 441; and note the Commission's use of the quotation in press release No. 133 (1961).

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

more than freedom from physical harm and imprisonment. Why should those cases have outpaced due process cases? Why in private suits for damages or an injunction should legal interests be protected that due process leaves helpless? Examples are the interest in freedom from interference with reasonable economic expectancies, the interest in personal reputation and in freedom from disparagement, and the interest in freedom from emotional upset.[11]

The privilege doctrine should be junked, and "life, liberty, or property" should be treated as a description of all legal interests. To the question, "Won't you still have to define that last phrase?" the answer is, "Of course." But definitions can be guided by a bulk of precedents that makes far more sense than have judge's travails as to the rights of saloon keepers, dancehall operators, Government employees, and aliens.

To pronounce that "liberty, or property" includes, say, reputational and emotional interests would not mean that governments no longer could deprive people of those interests, or that deprivations could be effected only by judicial trial. The requirement would merely be that due process be accorded. With no trial and without a chance sometimes even to argue, people are often deprived of their property and liberty and even their lives; but in emergency cases, for example, due process is not necessarily violated.

Recognition of a due process freedom from disparagement or emotional upset would not require procedures the same as those which now protect a man's employment security, say, or his land. The nature of the interest must be taken into account. That is why we demand special strictness for criminal proceedings, forfeiture proceedings, proceedings involving citizenship. That "life" and "liberty" and "property" are constitutionally conjoined does not mean that all interests therein merit identical protection.

In *Hannah* v. *Larche the* Court may wisely have decided that a certain civil rights hearing should not be proscribed, even though appraisal, confrontation, and cross-examination were to be denied. The Court's analysis would have been sounder, though, had it discussed differences between (1) a hearing that injures a witness by publicity which defames, degrades, or incriminates him and (2) a hearing that avoids those effects. In private law most courts have proved their fitness boldly to protect liberty and property interests. The Supreme Court is not honored by an implication that "Whatever procedure is authorized by Congress, it is due process as far as a witness who is merely defamed, degraded, or incriminated at a hearing is concerned." [12]

B. The too pervasive criminal trial analogy

The majority Justices in Hannah are to be commended for the breadth of their inquiry. Though the Louisiana registrars had been accused of crime, the Court in seeking analogies did not limit itself to criminal proceedings. It considered also the investigatory traditions of administrative agencies and of legislative committees.

Generally, judges (and scholars) assume too often that the criminal process is a model for other processes. We say, "Due process of course must be observed in civil as in criminal trials, but since civil defendants are not alleged criminals some guarantees (e.g., proof beyond a reasonable doubt) do not apply." Similarly, licensees merit still lesser protection; and even less than that need be granted to prospective licensees, conscientious objectors, people who are mentally ill, Government contractors, and parolees—all because they are not the accused in a criminal trial.

Consider the dictum that we test for due process by seeing whether procedures "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." [13] Consider the recent cataloging of the values involved in procedural due process as (1) "insuring the reliability of the guilt-determining process," and (2) "insuring respect for the dignity of the individual." [14] The isolation of that second value is a major contribution to our understanding of due process, and may bring us great profit (see below). The first value, however, never should have been characterized as one circumscribed by "guilt-determining." What due process aims for is reliable truth-determining or, broadly, the reliability of the determining-making process. (We cannot use "decisionmaking" because it may imply adjudication, broader than "criminal" but still too narrow.)

The due process clauses do not restrict all determination-making by Government. They do apply whenever determination-making deprives a person of life, liberty, or property. The word "deprive" needs emphasis. It has no kinship to guilt. I does no imply, "No person shall be deprived [in the way alleged criminals in medieval England often were deprived] of life, liberty, or property without due process." It rather must be read, "No person shall be deprived [in any manner whatsoever] of life, liberty, or property without due process."

One gain might be that we no longer would measure public utilities, TV networks, social security beneficiaries, schoolteachers, and juvenile delinquents on the scale of procedural rights that gives 100 points to alleged murderers and zero points to an unwanted Cabinet official.[15] A related gain might be an awareness that due process sometimes should give people more rights than criminal proceedings insure. The fact that pretrial discovery may be narrow in criminal cases, for example, hardly means that it should be no broader in hearings on license applications. Subpenaed civil rights witnesses should not be estopped from making a case for limited cross-examination merely because suspects before a grand jury may be denied that right.[16]

II. DUE PROCESS RIGHTS SHOULD BE CLASSIFIED AND DISTINGUISHED FROM OTHER CONSTITUTIONAL RIGHTS

It is difficult to justify a brief filed in the Supreme Court that begins, "The question presented is * * * the right of Congress or the [Civil Rights] Commission to violate under the 14th amendment the rules of fairplay and the traditional forms of fair procedure without explicit action by the Nation's lawmakers even if it is possible that the Constitution presents no inhibition." [17] Literate lawyers at least ought not suggest that Federal officials are ruled by the 14th amendment rather than the 5th.

It is also difficult, though, to censure illiteracies that could well be the result of the courts' 5th and 14th amendment confusions. Due process of the 14th amendment includes some Bill of Rights, non-5th amendment procedure rules and some 1st amendment substantive rules, but not all of them. Fifth amendment due process includes some but perhaps not all of "equal protection of the law." Both cover void-for-vagueness; but that doctrine has a unique role regarding the "preferred" freedoms, and we never have decided whether it is really procedural or substantive.[18]

Overlaps are inevitable. But would it not help if rights claimed as constitutional were always, to the extent practicable, wrapped in the words that are most apt? Thus, if we seek a right not to be exposed by Con-

---

[11] The technical terms are from Harper & James, "Torts," xii-xv (1956); cf. Prosser, "Insult and Outrage," 44 Calif. L. Rev. 40 (1956); Prosser, Privacy, 48 Calif. L. Rev. 383 (1960). See also *Greene* v. *McElroy,* 360 U.S. 474, 493 n. 22 (1959); *Anti-Fascist Comm.* v. *McGrath,* 341 U.S. 123, 139 (1951); Rothbard, "Human Rights Are Property Rights," The Freeman, April 1960, p. 23; note, 65 Harv. L. Rev. 156 (1951); cf. Parker, "Administrative Law," 36 n. 36 (1952) ("The meagerness with which our problem—viz., what rights are protected by due process?—has been dealt is astounding"). The best and most complete discussion of the privilege doctrine is 1 Davis, "Administrative Law Treatise," secs. 7.11–7.20 (1958). Professor Davis concludes, "Instead of 2 categories [right and privilege] we could have 6 or 20, for the weakest privilege or absence of privilege to the strongest constitutional right." Id. at 508. I prefer three categories: life, liberty, and property. Many interests are not legal interests and thus are not life, liberty, or property interests. Those that are, however (and I suggest the torts cases as guides), merit due process protection. That does not mean that the processes fit for allegedly subversive employees or allegedly knowledgeable witnesses must be the same as those for allegedly immoral aliens or the defendant in a criminal case. Cf. id. at 462.

[12] I have thus paraphrased a dictum in *United States ex. rel. Knauff* v. *Shaughnessy,* 338 U.S. 537, 544 (1950). For criticism of the analysis in the Hannah case see Newman, supra, note 7.

[13] *Malinski* v. *New York,* 324 U.S. 401, 417 (1945).

[14] See Kadish, supra, note 3, at 346–347; supra, note 4, at 99. My criticism of Professor Kadish's ideas are meant to be tributes, not complaints. The process of prescribing due process might be aided immensely if scholars were more conscientious in building on the foundations occasionally laid by outstanding writings such as the articles of his I have cited.

[15] "The discharged Cabinet officer may have a property interest in his job and in his reputation, but we want the President to have an unrestricted power to discharge him." 1 Davis, "Administrative Law Treatise," 454 n.7 (1958). Do Premier Ben-Gurion's recent struggle re Israeli Defense Minister Lavon suggest that Professor Davis may go too far? Should a Cabinet officer be defenseless against findings of bribery or sexual immorality? If he could show there was no evidence against him, or no evidence other than the charges of a confessed liar, relief by way of declaratory judgment might well be appropriate. Cf. Gardner, "The Great Charter and the Case of *Angilly* v. *United States,*" 67 Harv. L. Rev. 1 (1953).

[16] There are many reasons why grand jury hearings are more protective than civil rights hearings. Cf. note, 74 Harv. L. Rev. 590 (1961). On the pretrial point, the Government argued in Hannah that "prehearing notice of the contents and sources of allegations made against them—which plaintiffs claim is their constitutional right—is not even provided on the issue of guilt or innocence in Federal criminal prosecutions." Brief for appellants, p. 40. Civil rights witnesses, however, do not benefit from pleading and trial traditions that protect alleged criminals. Also, they have not been indicted; and would it be wrong to assume that there would be less risk of their fabricating false evidence than of an indictee's?

[17] Apellee's brief in *Hannah* v. *Larche,* pp. 1–22; and see p. 85 of the transcript of oral argument ("the 14th amendment because they are denying them due process of law").

[18] See Hand, "The Bill of Rights" (1958); cf. McWhinney, "The Power Value and Its Public Law Gradations: A Preliminary Excursus," 9 J. Pub. L. 43 (1960).

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

gress or a right to be silent or to be let alone, we need very sophisticated analyses of article I and the first amendment and the privilege against self-incrimination, as well as of residual due process. Relations between due process and the sixth and seventh amendments ("criminal prosecutions" and "suits at common law") need clarification too, as does the impact of the fourth amendment as well as due process on "compulsory extortion of a man's own testimony."[19] Even within the fifth, what is due for grand jury proceedings may differ from the implications of "No person shall be held * * * unless on a presentment or indictment." And have we not learned enough about the privilege against self-incrimination to enable us to concede that we need not force a man to forfeit other protections (e.g., procedural protections) merely because he is about to be incriminated and thus may claim the privilege?[20]

To suggest that doctrine and arguments should be solidly based is far from startling, and I hope readers will not infer that next on the agenda is to be a criticism of the West Digest outlines. Are we not startlingly ignorant, though, as to the panoply of rules of due process? Have reasonably adequate summaries ever been constructed? Has any judge, scholar, or practitioner ever mastered those rules in the way that other law has been mastered (evidence, contracts, torts, and tax, for example)? Mere wishing for a summary or a Wigmore or Williston gains us little, but more imaginative building of large and small blocks of due process law could indeed be useful.

A distinction noted above illustrates the point. Some due process rules aim to insure the reliability of the determination-making process (e.g., rules requiring cross-examination and an unprejudiced tribunal). Others aim at respect for the dignity of the individual (e.g., rules against stomach pumping and cruel punishment). That classification could vitally affect due process semantics. "Fairness," for instance, must have an ingredient of efficiency when we test the first kind of rule (reliability) that normally could be absent in rules aimed at personal dignity. And judicial standards such as "hardship so acute and shocking that our policy will not endure it"[21] and "protection of ultimate decency in a civilized society"[22] seem to fit the second value better than the first.

The recent Davis "Administrative Law Treatise" supplies a more than ample base for classification. If its teachings as to the administrative process could now be integrated with comparable studies of court processes (including analyses of contempt procedure, for example, as well as police, mental health, and family court procedures, etc.) the prescribers of due process would gain immensely.

III. AN ANALYTICAL CHECKLIST MIGHT AID THE DECIDING OF CASES

Appellate courts are not an audience of law students. Yet their handling of due process cases might benefit from the kind of issue-finding checklist that has helped many law students analyze difficult examinations. For when the procedure of government officials is measured for compliance with due process, are not these questions relevant?

A. Apart from alleged procedural error, exactly how did officials harm (or threaten to harm) complainant in this case?

We have seen that much may hinge on "deprive" and "life, liberty, or property." However interpreted, though, those words must be tailored to proved facts. Assume that courts do construe "liberty, or property" to include freedom from reputational harm. The precise interests jeopardized still must be identified in each case, as must the official conduct that caused the jeopardy.

In *Hannah* v. *Larche* the phrase "defame, degrade, or incriminate" was critical. Yet whether the registrars truly did risk defamation or degradation was pretty much left to inference, and the attorneys never did dramatize the ways in which the Commission threatened to deprive the registrars of the interests that inhere in freedom from defamation and degradation. Similarly, though the registrars had been subpenaed and thus risked injury required to be self-inflicted,[23] language of the Court implies that supenaed witnesses are no different from other people whom the Commission's activities might harm.[24]

The kind of precise portrayal of harm that may crucially affect a lawsuit is exemplified by petitioner's brief in *Peters* v. *Hobby*.[25] "We of course concede," said counsel, "that the Constitution does not limit the power of the executive summarily to terminate employment on secret information or for any other reason. The question before this Court is only whether the Government has the right to accompany a discharge with a finding of disloyalty which ruins the reputation and career of the accused, without a full hearing."[26] In other words, the protested harm was not to job security but to one's repute as a prospective jobholder.[27]

B. Exactly what procedural rights were granted, available, denied?

Phrases like "notice," "summary procedure," and "right to be heard" are of decreasing value in due process ligitation. Sometimes because of their fuzziness they are provably misleading. Procedural rights are bands on a spectrum, and courts are led astray if they have to hazard a guess or examine the record miscroscopically to ascertain which bands merit attention. Too many briefs and opinions never tell us exactly what rights were granted the complainant, to offset those denied, or what rights might have been available had he made a timely request.

Hannah v. *Larche* is disturbingly illustrative. Appraisal, confrontation, and cross-examination are rights the Court held may be denied to witnesses. But with respect to cross-examination was it relevant that complainants could have submitted to the Commission questions to be put to their accusers? With respect to confrontation was it relevant that all accusers who were scheduled to testify could have been confronted? And with respect to apprisal what really do we learn from the Court's language: Were the subpenas sufficient? Was their vagueness illuminated by "315 written interrogatories"? Is a chairman's "opening statement [of] the subject of the hearing" enough? Could complainants have been denied the right to hear or read what their accusers who testified had to say?[28]

All conceivable rights need not be separately arrayed in each case, for red penciling or blue penciling as to grant, availability, and denial. A general arraying is useful, however, and for border zones helps compel the tougher analyses that too often are shunned. With an array, judges might even be able to unravel some three-dimensional complications. In Hannah, for instance, what should the Court have pronounced as to secret hearings (which in fact were prescribed by Congress)? If freedom from defamation and degradation is "liberty, or property," should due process for secret hearings require less severe rules than those for public hearings (as to appraisal, confrontation, cross-examination, and right to counsel, for example)? We are miles from solving that problem,[29] and by overlooking the complainants' right to a secret hearing the Court in Hannah probably has made the solution more difficult.

Finally, an accurate charting of rights granted, available, and denied would assure cognizance of some worthy ideas that relate to the timing of judicial redress. In Hannah all the judges chose to avoid a holding as to ripeness and exhaustion of administrative remedies. But the fact that some issues may have been ripe[30] does not mean that all procedural rulings were fixed. Secrecy versus publicity; the Commission's use of nontestifying accusers; the value of submitting questions for the Commission to put to testifying accusers; those are sample issues the Court never faced. Yet its opinion will encourage too many readers to infer that due process requires none of the rights that proper analysis of those issues might ensure.

C. To decide the case is it necessary to apply the Constitution?

A settled doctrine requires that judges look critically at all statutes and regulations which allegedly permit a process that allegedly violates due process. "Traditional forms of fair procedure [must] not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition."[31] There are some traps for the unwary, but we shall not discuss them here because the

---

[19] *Boyd* v. *United States*, 116 U.S. 616, 630 (1886).

[20] See the discussion on pp. 112–113 of the transcript of oral argument in the Hannah case ("There might not be the necessity for pleading the fifth amendment if we were given the opportunity of presenting witnesses."). But cf. *In re Groban*, 352 U.S. 330 (1957).

[21] *Palko* v. *Connecticut*, 302 U.S. 319, 328 (1937).

[22] *Adamson* v. *California*, 332 U.S. 46, 61 (1947).

[23] For an example of Commission-sponsored harm to reputation that had its origins in compulsorily self-inflicted injury see p. 5 of the Commission's NPR–44 (Dec. 12, 1958): "The election officials recited their excuse for not testifying in a halting manner, requiring coaching and prompting from their attorneys every four or five words."

[24] 363 U.S. at 443. I think this explains why the Court misconstrued the words of the injunction. Id. at 429 n. 11 and 444 n. 20.

[25] 349 U.S. 331 (1955).

[26] Brief for petitioner, p. 10, *Peters* v. *Hobby*, 349 U.S. 331 (1955). Approval of counsel's concession should not be inferred from its quotation here.

[27] Cf. Gardner, "The Great Charter and the Case of *Angilly* v. *United States*," 67 Harv. L. Rev. 1, 21 (1953) ("the circulation of adverse opinions about Angilly's character was no part of the duty of the collector's job").

[28] For discussion, see Newman supra, note 7.

[29] Cf. the dissenting opinion in *Hannah* v. *Larche*, 363 U.S. 420, 496 (1960).

[30] There are not many cases where, for threatened procedural irregularities, an agency hearing has been enjoined. 3 Davis "Administrative Law Treatise," chs. 20 and 21 (1958). The attack in the Hannah case was directed at procedural rules. They were "final agency action" within sec. 10(c) of the APA, 60 Stat. 243 (1946), 5 U.S.C. sec. 1009 (1958); but query whether there was "no adequate remedy in any court." Cf. sec. 105(g) of the Civil Rights Act of 1957, 71 Stat. 636 (1957), 42 U.S.C., sec. 1975d(g) (1958). The Solicitor General did not discuss this issue even though the Department of Justice had pressed it at the trial level.

[31] *Greene* v. *McElroy*, 360 U.S. 474, 508 (1959); *Clancy* v. *United States*, 81 S. Ct. 645 (1961).

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

matter involves statutory interpretation rather than due process.

Other doctrines that seem to be less used in due process cases could have a like impact. Do they merit more use? The doctrine of prejudicial error, for example, has a respectable history that Congress honored in the Administrative Procedure Act.[32] It can be twisted by compelling a complainant to prove too much, and a concern for decent governing may require that it not affect certain cases (death penalty cases, say). But would not due process law generally profit from the kind of precise identification and measurement of procedural harm that we recommended above for substantive harm? Little damage can result from "Whatever the bounds of due process, complaint here has not been prejudiced."[33]

Another set of nonconstitutional inquiries pertains to cases where courts are not the aggressors against government (as when they enjoin hearings), but are rather the dispensers of power (as when their aid is sought to enforce subpenas or other agency commands). In Hannah it was held that due process did not authorize the enjoining of a civil rights hearing. Might the court have been more solicitous of witnesses' rights had the appeal resulted from a lower court's refusal to enforce a civil rights subpena, rather than an order which made the lower court an aggressor?[34]

D. If it is necessary to test for due process [and again note the need for checking, too, other clauses of the Constitution], what authorities have approved, disapproved, or proscribed the questioned procedure?

We need not fret here about stare decisis. Locating all the precedents may be troublesome (because of the stunted progress on classification we mentioned above), but the course of due process precedent does not vary from what seems set for most constitutional litigation.

What may distinguish due process cases is the density of nonjudicial precedent. At times, the quest for what courts have done seems almost incidental. That quest is now complemented by the inquiry, "What procedures have governments actually used in matters like this?" The Brandeis brief has a noble history, and its utility for subjects other than economic regulation is established.[35] When it is launched full blown into the fray of due process, however, it sometimes seems more akin to Stephen Potter and his gamesmanship than to a distinguished jurist and his drive for social reform.

The main trouble with noncourt precedents in procedure cases is that they approach infinity. An important argument can begin, "In the FTC, CAB, NLRB, and Department of Interior, for example." Or, "In 23 States public utilities commisions." Or, "In the juvenile delinquency proceedings surveyed by the editors of the Indiana Law Review." Or, "In Queensland, Northern Ireland, and Pakistan." Or, "Compare [or contrast] the long-established practices as to allegedly insane criminals in France, Norway, Nazi Germany, and/or Soviet Russia." And historical inquiry adds a vast dimension of time to that of geography.

The Court in *Hannah* v. *Larche* thought it "highly significant that the Commission's procedures are not historically foreign to other forms of investigation under our system."[36] We are then invited to consider:

1. "The first full-fledged congressional investigating committee. * * * The development and use of legislative investigation by the colonial governments. * * * The English origin of legislative investigations in this country. * * * The English practice [now]."

2. A "vast majority of instances * * * [where] congressional committees have not given witnesses detailed notice or an opportunity to confront, cross-examine and call other witnesses."

3. "The history of investigations conducted by the executive branch of the Government."

4. Processes of the FTC, SEC, AEC, FCC, NLRB, OPS, OPA, FDA, Department of Agriculture, Tariff Commission, and "many of the most famous Presidential commissions."

5. "The oldest and perhaps, the best known of all investigative bodies, the grand jury."

That is an impressive list—though more agencies could have been added, of course, as well as State and Commonwealth precedents.

What causes pause is that the research required to document that kind of survey can be quite taxing. And there is evidence that the lawyers and clerks who aided the Court in Hannah did not tax themselves sufficiently.[37] Public administration research and historical and comparative research demand a scientific method; and findings that are accurate, complete, valid, and reliable are not easily assured.

The decade of the 1960's is hardly a time for arguing that tough due process cases should be decided without reference to the practice of other tribunals, other governments, other eras. We must recognize, nevertheless, that the data collected will tend to be anecdotal even if they are trustworthy. "[T]he considerations of fairness that reflect our traditions of legal and political thought."[38] are often elusive, and the amassing of citations which purport to illumine those traditions sometimes adds little light indeed.[39]

E. Exactly how would efficiency be affected, in this and similar proceedings, if complainant's request were allowed? (herein of deference)

Even if "traditions of legal and political thought" have been revealed, they need be "duly related to the public interest Congress sought to meet * * * as against the hazards or hardship to the individual that the * * * [attacked] procedure would entail."[40] Gospel truths are that due process shields us from other public interests and that the other interests give way whenever "the hazards or hardship to the individual" loom too large.

This article will not explore the issues of deference and balancing that perplex judges when they apply first amendment due process, or aim to ensure "respect for the dignity of the individual."[41] Instead, we ask if those issues demand the same articulation when judges seek to preserve what we labeled above "the reliability of the determination-making process." If the public interest, for example, is to keep movies clean and to imprison dope addicts, prior censorship and stomach pumping may or may not be constitutional, given a court's view of fundamental rights and individual dignity. But prior censorship and stomach pumping, per se, are not unreliable. They can be efficient truth-determining techniques, whether or not lawful.

When we permit censorship and testing of the human body, however, the procedures often must be checked for reliability. Thus, each exhibitor ought to be allowed to argue that his movie should not be censored, and the questioning of physiologists' techniques (e.g., on blood tests) should be permitted, because we know that arguing and questioning may well expose error arising out of those procedures.[42]

What truly is the public interest in procedure itself (or more precisely, in the procedures that may lead to depriving people of their life, liberty, or property)? Is it not to insure that correct determinations will be made (and thus only the deserving de-

---

[32] Supra, note 30, § 10(e).

[33] Cf. *Market St. Ry.* v. *Railroad Comm'n*, 324 U.S. 548, 562 (1945). A prejudicial error doctrine would not be contrary to the Karl Llewellyn rule that "once there is a clearish light, a court should make effort to state an ever broader line for guidance." Llewellyn, "The Common Law Tradition: Deciding Appeals," 398 (1960). Does his rule, prescribed for appellate work generally, apply to all due process cases? I submit that the potential harm to government of cases that say "This and like procedures are bad" is much less than the potential harm to citizens of "This and like procedures are permissible." (Cf. the *Hannah* case.) The reason is that officials tend to push the borderlines to the citizen's disadvantages in both situations.

[34] Cf. *United States* v. *Kleinman*, 107 F. Supp. 407, 408 (D.D.C. 1952).

[35] See 2 Davis, "Administrative Law Treatise," 354 (1958); cf. Doro, "The Brandeis Brief," 11 Vand L. Rev. 783 (1958).

[36] 363 U.S. at 444.

[37] See Newman, supra, note 7.

[38] Frankfurter, J., concurring in *Hannah* v. *Larche*, 363 U.S. 420, 487 (1960).

[39] Professor Kadish perceptively describes and evaluates the "criteria for interpreting a flexible due process." Kadish "Methodology and Criteria in Due Process Adjudication—A Survey and criticism," 66 Yale L.J. 319, 327, 344 (1957). He concludes, "the Court has [regarded] * * * its function as one of passively applying moral judgments already made, rather than as one of actively making new moral decision." Id. at 344. He does not fully explore "whether the Supreme Court is institutionally equipped to ascertain and evaluate the complex factual data necessary for rational decisionmaking." Id. at 359. But his inquiries into "the data of comparative legal systems" (p. 354) and "the use of knowledge outside the record" (p. 359) lead me to wonder, Are mountains of data ever likely to be truly as enlightening as an insistent focus on good sense? He searches for "the effect of an added risk of misdeterminations if certain procedures are sanctioned, and * * * the effect of not permitting an attenuation of those procedures." (p. 353) That is a scholarly definition of what I have loosely labeled "efficiency." In the *Hannah* case, I believe, the Court was so bogged in data that its members never did exploit their own good sense on how complainants' requested rights might have affected the efficiency of the Civil Rights Commission. Another example is *Anonymous* v. Baker, 360 U.S. 287 (1959). Since the investigator there "expressed his readiness to suspend the course of questioning whenever appellants wished to consult with counsel" (id. at 28), exactly how would efficiency have been hurt if counsel had been allowed to observe the proceedings?

[40] Frankfurter, J., concurring in *Hannah* v. *Larche*, 363 U.S. 420, 487 (1960).

[41] See Hand, "The Bill of Rights" (1958).

[42] On blood tests, compare the court of appeals opinion in *United States ex rel, Lee Kum Hoy* v. *Shaugnessy*, 237 F.2d 307, 308 (2d cir. 1956) ("the data * * * established conclusively that Lee Ha could not be the father"), with the Supreme Court's per curiam notation that remand was necessary because "the blood grouping tests made herein were in some respects inaccurate and the reports thereof partly erroneous and conflicting," 355 U.S. 169, 170 (1957). Cf. In re Newbern, 175 Cal. App. 2d 862, 1 Cal. Rptr. 80 (1959); and see Littell and Sturgeon, "Defects in Discovery and Testing Procedures: Two Problems in the Medicolegal Application of Blood Grouping Tests," 5 U.C.L.A.L. Rev. 629 (1958).

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

privations be effected), except where some margin of error seems essential to avoid ills that inhere in procedure (e.g., cost and delay)?

To illustrate: The public interest in censoring dirty movies might be jeopardized if the only available procedure were trial by jury; and too few drunk drivers might be punished if every government breath-tester could be subpenaed and cross-examined as to the conditions surrounding his breath-test. Yet censors and testers err, as do all government officials; and centuries of revolution and war warn us that too much error is intolerable. The problem is to set the margin of tolerable error, given the ills of too much procedure. (That margin is usually minimized, of course, by the inventiveness of law men who demonstrate that devices such as preliminary injunctions can avoid the harm of dirty movies, pending a truth-seeking trial, and that allowing a man's own doctor to repeat a health official's test is a check on accuracy that raises hardly any of the questions which trouble us as to cross-examination of health officials.)

In due process cases there are these critical questions: (1) Exactly how would "efficiency" be affected, in this and similar proceedings, were complainant's request for procedural rights allowed? (2) Should courts make that determination or should other officials?

The Civil Rights Commission's assignment is to submit reports to the President and the Congress. Those reports are to "appraise the laws and policies of the Federal Government with respect to equal protection of the laws," and the Commission is directed to "study and collect information concerning legal developments constituting a denial of equal protection of the laws." The public interest is manifest; and efficiency would suffer if the Commission, after it had studied sociological and statistical reports and law review articles, say, were required to notify interested citizens of a grand hearing to be convened at which the authors of those reports and articles could be cross-examined. The band of Commission error that thus might be exposed is far less significant than the obvious ills of that procedure; and the right to petition the Government (as well as advising one's legislators, participating in congressional hearings, etc.) seems sufficient for keeping the margin of error low.

The Commission is further directed, however, to "investigate allegations in writing * * * that certain citizens of the United States are being deprived of their right to vote and to have that vote counted by reason of their color, race, religion, or national origin; which writing, under oath or affirmation, shall set forth the facts." The public interest implied in that directive relates to evildoing—the kind of evildoing that may first, persuade Congress to enact law; and second, persuade the President that he should either (A) encourage Congress to enact law, or (B) advise his Attorney General or other subordinates of a possible need for appropriate action. Quite clearly, Congress no longer was satisfied with the type of informal accusations that normally are adequate for legislating. Apparently too, Congress was not satisfied that the Attorney General and other policemen knew enough about existing violations of law. So sworn accusations were called for, setting forth "the facts"; and the Commission was directed to investigate them. As LYNDON JOHNSON said on the floor of the Senate, "It can gather facts instead of charges; it can sift out the truth from the fancies."[43]

What of efficiency? During the year ending in August 1959, the Commission received approximately 240 accusations involving 29 counties in 8 states.[44] By February 1960, at least 86 more had been filed, involving 4 additional counties.[45] The Commission favors "full investigations,"[46] which apparently means careful study, field interviews, and—on rare occasions—hearings. This seems clear: To advise every accused evildoer that he has been accused, to tell him who accused him, and/or to permit him to cross-examine his accusers might be too complicating, too delaying, too costly.

What if the accused is subpenaed, however, to testify regarding an accuser's testimony at a public hearing? Would it be inefficient to let him know generally what the Commission was after, what kind of examination he would be expected to face, what evidence he should be ready to produce? Would it be inefficient before he testifies to let him sit with the public as a spectator? Would it be inefficient to allow him a limited right of cross-examination, or to submit questions for the Commission to put to his accusers?

Those are questions *Hannah* v. *Larche* did not answer, and they illustrate a variety of questions that ought to have been answered. They relate to the reliability of the determination-making process. One can ask whether the margin of error that might have been minimized by the rights postulated, for that kind of civil rights hearing, would truly have been offset by the ills that sometimes might accompany such rights.

That weighing of procedures' efficiency leads to the question, Who decides? When should courts defer to the judgment of the legislature? Of the Chief Executive? Of Cabinet officials? Of policemen, prosecutors, prison wardens, psychiatrists? If we sought only "the considerations of fairness that reflect our traditions of legal and political thought, duly related to * * * the hazards or hardship to the individual that the * * * [attacked] procedure would entail," judges ought to be paramount.[47] When we also seek "the public interest," however, so that it too can be balanced with the traditions and the individual's interest, efficiency is the new ingredient. The play between procedure and the goals of government becomes crucial, and the epic of administrative law—in New Deal years especially—resounds with reminders that courts' views of efficiency are often believed to be heedlessly frustrating. Even so, the case for deference by judges is weakest when procedural due process is at stake; and these observations seem noteworthy:

First, the legislature is often the antagonist in litigation that involves economic controls, equal protection, censorship, and other substantive questions. In procedural due process cases, contrastingly, courts hardly ever have to declare a statute unconstitutional. For legislatures rarely say, "This is the procedure we want used." Instead they broadly delegate procedure-making authority, and the result is that courts then war with lesser bodies than the legislature itself. Even when a statute is voided that says to an agency, "You may if you wish deny the right to cross-examine," the effect is different from the voiding of a statute providing, "Cross-examination must not be allowed, for the public interest then would suffer." That latter statute is atypical.

Second, administrators (and investigating committees, grand juries, and in fact all lesser officials with jobs to do) have demonstrated, I think, that they are less trustworthy with respect to procedure than are judges. I refer not merely to the abuses of loyalty-security, the pillorying of peoples' reputations, illegal police practices, or other histories of arbitrary action. Nor would I add only the reminder of Justice Douglas in Hannah that "Men of good will, not evil ones only, invent, under feelings of urgency, new and different procedures that have an awful effect on the citizen."[48] I am more influenced by the fact that administrators too often have cried, "Wolf, wolf." Too often, for example, have government attorneys pleaded that to grant rights requested by the complainants would wreck their agency's program—when, following defeat in court, it becomes obvious that the threats were posh. Even in the Supreme Court, where governments have such great resources for winnowing out their borderline cases, is it not astonishing that the Solicitors General (and their State counterparts) so frighteningly often have been wrong on what fundamental fairness requires? And how inadequate, empirically, have been their hundreds of awful-consequence predictions regarding the efficiency and effectiveness of government business.

Judges are sometimes wrong, too. And it may be that a few decisions are making a few criminals' lot a happy one, or that appellate judges as a group still are too eager to impose court rules on agencies whose tasks call for a modified process and a freedom to experiment. In bulk, though, the sins of judges who aimed to insure due process surely have been overbalanced by the sins of bureaucras who—conscientiously, vigorously, in good faith we assume—seek means that at first glance appear the least disruptive to their immediate ends. Too few administrators have acknowledged that "due process of law is not for the sole benefit of an accused * * * [and] is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice."[49]

IV. WHO COULD SPEARHEAD REFORM, HOW?

The people who prescribe due process are nearly always adjudicators—administrative or judicial. In their adjudications they ex-

[43] 103 CONGRESSIONAL RECORD 126637 (daily ed., Aug. 7, 1957).

[44] 1959 Report of the Commission on Civil Rights, 55.

[45] 106 CONGRESSIONAL RECORD 3405 (daily ed., Feb. 27, 1960).

[46] 1959 Report of the Commission on Civil Rights, 55.

[47] But cf. *Norwegian Nitrogen Prod. Co.* v. *United States*, 288 U.S. 294, 321 (1933): "Since a hearing is required, there is a command by implication to do whatever may be necessary to make the hearing fair. A duty so interdeterminate must vary in form and shape with all the changing circumstances whereby fairness is conditioned. The appeal is to the sense of justice of administrative officers, clothed by the statute with discretionary powers. Their resolve is not subject to impeachment for unwisdom without more. It must be shown to be arbitrary."

[48] 363 U.S. at 507.

[49] *Shaughnessy* v. *Mezei*, 345 U.S. 206, 224–225 (1953) (dissenting opinion); cf. Gellhorn, "Changing Attitudes Toward the Administrative Process," in "Individual Freedom and Governmental Restraints," ch. 1 (1956). For further comment on deference and due process see Kadish, "Methodology and Criteria in Due Process Adjudication—A Survey and Criticism," 66 Yale L.J. 319, 358–59 (1957; cf. id. at 337 n. 114 ("In the area of procedural due process * * * [Justice Frankfurter] seems to be asserting a doctrine that increases, rather than decreases, the latitude of discretion open to the Court in adjudicating constitutional issues."). Learned Hand, who recently admonished that the courts' duty of deference must not be denigrated, seems to categorize procedural due process separately. Hand, "The Bill of Rights," 44–45 (1958). It is significant that the widely distributed prefact to Davis, "Administrative Law Treatise" (1958), which documents Supreme Court misfeasances by citing chapter and verse, complains of no procedure cases? Cf. 2 id., sec. 16.10; 1 id. 471 (discusses efficiency without mention of deference).

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

amine procedure to see if it is constitutional. On occasion, agencies and trial judges set the law of due process (e.g., when a body like the NLRB declares, "No less than this does due process require."). But appellate courts are paramount, of course; the Supreme Court, preeminent. Inevitably this article treats of that Court's problems. Its process for prescribing due process is emulated by other prescribers, and the target of reform is there if the process be deficient.

Whether legal writings point the way to reform is not always a test of their utility. Some of the best do not aid reformers but rather contribute to knowledge, understanding, or their readers' enjoyment. Yet aid to reform is a valued goal, and provides an interesting test for what Erwin Griswold has called "the current chapter in the long history of criticism of the Court."[50]

The message in most of the newer criticism is that the nine Justices who comprise the Court themselves bear responsibility for its ills. If we imagine, for instance, a conscientious, newly appointed Justice who is eager to fashion the image toward which he should strive, he would learn from careful study of the recent critiques that he and his colleagues should be wiser, more lawyerlike, more statesmanlike, more perceptive, more efficient, less dilettante, less opinionated, more or less worldly, more or less consistent, more or less unanimous, etc. (He would also learn that the mere reading of all those books and articles probably fouled up his time chart.)

Here we deal only with procedural due process, and that topic is not how the Court should manage its business or how the Court should handle constitutional law. But we have considered reforms, and an identifying of possible reformers seems fitting. What is clear is that we will delude ourselves if we assume the Court alone has the burden of improvement.

Questions this article has posed relate, for example, to "good lawyering." Is not that attribute one which in the Court is far more institutional than personal? Are not craftsmanship and understanding far less dependent on the conscience and will of nine Justices than on the presented product of counsel, trial courts, law clerks, other participants? In Hannah, for instance, though the case was terrifically complex, the opinions and the Justices' comments in oral argument show an awareness of issues and of law that was nowhere near matched by counsels' briefs or arguments. Who, then, is to blame for missing some of the subtle points discussed above (particularly when we see that Hannah was announced the same day as *Aquilino, Durham, Locomotive Engineers, Annheuser-Busch, Metlakatla,* three *Steelworkers* cases, *Flemming* v. *Nestor, Miner* v. *Atlas, Schilling, American-Foreign Steamship, Hudson,* and *Cory Corp.* v. *Sauber*[51])?

Thruman Arnold's comment that the Supreme Court opinions "rank higher than the articles which appear in the Harvard Law Review" is worth pondering.[52] Do not current attacks on the Court, even when "based on understanding and respect and designed to assist the Court with its great and difficult task in our constitutional system,"[53] tend to reach for a perfection that no nine Justices, law professors, Wall Street lawyers, or men or angels could ever attain? Improved lawyering and sounder analyses and new lines of inquiry and efficient procedures must be institutional goals. Our worst sin as critics has been an unscholarly premise that some outstanding men named Warren, Frankfurter, Black, et al., somehow should take on an assignment that in fact must largely be ours and many others'.

The problem of court reform is reminiscent of problems of influence peddling. There the initial cry was for improved ethics in the regulatory agencies. Then it became clear that the issues were really quite complex and that some of the boldest critics—Congressmen and lawyers—were themselves deeply involved. Influence peddling problems still are mostly unsolved; but we have learned that agencies' codes of ethics are only piecemeal solutions, and that self-reform within Congress and the bar may be much more critical.

Consider similarly the aches of investigating committees. We first pitted the good guys against the bad and hoped that sensible middlemen (Senators George and McCLELLAN, say) would restore law and order. Then we discovered that voters and newspapermen and thus politics were involved, and that fair committee procedure called for sophistications which only members of the bar could supply. The response of lawyer-planners and lawyer-draftsmen was excellent; and if more lawyer-statesmen had responded comparably (with the kind of lobbying campaign that is now being waged for professional men's tax benefits, say), we might have achieved for investigating committees a more impressive code than the House of Representatives' fair play rules.[54] (And who knows what impact that victory might have had on *Hannah* v. *Larche*?[55])

The influence peddling and investigating committee analogies show what can be done when less attention is given to "Here is what you the commissioners (or you the Congressmen) should do" than to "Here is what we the lawyers must do." The procedures of Congress provide a model too where critics finally realized that "Here is what we the professors must do." The Legislative Reorganization Act of 1946 is in large part a product of political scientists, after years of learned but unheeded scholarship as to legislatures' organizational deficiencies.[56]

Institutionally what might be done to improve the process of due process? As noted above we need a superior literature, which presses for precise definitions and what Karl Llewellyn calls "the structuring of whole fields and * * * the sweating of clarity out of tangled lumps of 5 or 15 or 50 or a hundred and fifty cases. * * * [For] it is the scholar who must carry the load first of stumppulling and then of dreaming or sweating up intelligible tentative drafts of sound design."[57] The need for that literature (and for efficient guides to its use, instead of our self-deceiving "Index to Legal Periodicals") should help keep us humble. No one can pretend, however, that the need is likely to inspire any foundation-sponsored or other project that in the foreseeable future could bring us closer to a better due-process process.

For measurable gain we must seek less remote proposals, such as Dean Griswold's suggestion that "the bar should take the lead in developing legislation which will reduce the burden on the Supreme Court."[58] The proposal I discuss now relates to the bar, particularly to traditions of advocacy that seem fixed for due process litigation (and, I suppose, most Court litigation).

If we must identify the mortal sinners in the due-process prescribing process, I nominate the lawyers for plaintiff and defendant. Their time chart is less compulsive than the Justices'; and they surely are most at fault when items on the checklist are unchecked, when exact harms, exact procedures, exact precedents are unidentified. A choice excerpt from one of the Hannah briefs (confusing 5th and 14th amendment due process) was quoted above. A score or more other excerpts would be equally damning. At oral argument why was the Court misled, for instance, as to the practices of congressional committees, the understanding of the Commission as to its duties re executive sessions, the Commission's interpretation of "defame, degrade, or incriminate"?[59]

The plain truth is that the Court does not benefit from what excellent advocacy could insure, just as it does not benefit from what excellent scholarship could insure. The temptation, therefore, is to conclude that lawyers must study the facts and law more carefully, write better briefs, prepare more painstakingly for oral argument. Unhappily, that has the same unreality as does telling scholars that the quality of texts and articles ought to be improved. Of course we need superior advocacy, but recognizing the need does not make the prospects of improvement less remote.

So, again, are we reduced to pontification that the true call is for a better bench, a better bar, better law schools—just as some critics argue that to control influence peddling and investigating committees we must elect better legislators and hire better men in Government? One hopes that less radical cures might be developed; and it is with respect to advocacy that one cure might be practicable, I believe.

When due process is prescribed, law is made—procedure law. Facts and arguments which influence that lawmaking are in part the same facts and arguments which would have influenced noncourt lawmakers—legislatures, agencies, judicial conferences, other groups that reform procedure law. The techniques for presenting facts and arguments, however, are phenomenally dissimilar. For in the process of prescribing due process we rely almost entirely on the talents and resources of two parties' lawyers.

To the comment, "Isn't that true for all judicial lawmaking?" I must reply, "Yes." And perhaps the process of all judicial lawmaking needs reforming, so we could bring to judges the wisdom and insights that are the product of procedures in statute making and rule making. I stress, though, three facts that may call for accelerated action on due-process process.

First. In due-process cases most private lawyers do not enjoy the competence that may mark their presentation of other cases. As a result, courts do not benefit from the high-quality lawyering that can aid tax law, labor law, criminal law, the law of the press, other subjects. Even civil liberties lawyers tend to be better informed on first amendment rights than on most due-process rights.

Second. Government lawyers, on the other hand, are able to acquire due-process expertness; and the fee and expense limits

---

[50] Griswold, foreword, "Of Time and Attitudes—Professor Hart and Judge Arnold," 74 Harv. L. Rev. 81, 82 (1960).

[51] See 363 U.S. 509–721 (1960).

[52] Arnold, "Professor Hart's Theology," 73 Harv. L. Rev. 1298 (1960).

[53] Griswold, "Foreword: Of Tome and Attitudes—Professor Hart and Judge Arnold," 74 Harv. L. Rev., 81 (1960).

[54] See, Newman, "Some Facts on Fact-Finding by an Investigatory Commission," 13 Admin. L. Rev.—(1961).

[55] Cf. Newman, supra, note 7.

[56] See Galloway, "The Operation of the Legislative Reorganization Act of 1946," 45 Am. Pol. Sci. Rev. 41 (1951).

[57] Llewellyn, "The Common Law: Deciding Appeals," 346 (1960).

[58] Griswold, "Foreward: Of Time and Attitudes—Professor Hart and Judge Arnold," 74 Harv. L. Rev. 81, 85 (1960); cf. Arnold, "Professor Hart's Theology," 73 Harv. L. Rev. 1298, 1300 (1960) ("How Professor Hart proposes to reform the bar he does not say.").

[59] See pp. 43–45, 50–58, and 93 of the transcript.

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

that in many cases confine private lawyering are not paralleled in Government. The two teams of lawyers, therefore, are not evenly matched; and the courts suffer. If Government advocates were statesmen, fit to guide judges wisely through labyrinths of righteousness, their competence would be a blessing. The facts, sadly, show that solicitors general and their counterparts are not permitted such a role. For their counsel is sought not when other officials wish to design a procedure, so that the lessons of "the very essence of a scheme of ordered liberty" may be put to good use. Rather they answer calls of alarm. They are shock troops to be rushed in when a lawsuit impends. Their job, with awful consistence, is to demonstrate that a procedure already set is really legitimate, though they and other lawyers (and people who designed the procedure, even) might now concede that de novo a more fair procedure should have been designed.[60] One shudders at the thought of the arbitrary governing that now might be our heritage if judges, year after year, decade after decade, had been overly impressed by the due-process expertness of Governments' advocates.

Third. Procedure (the kind of procedure that is used to deprive people of life, liberty, and property) is peculiarly a lawyer's topic. In other fields there are businessmen and churchmen and doctors and engineers for whom lawyers speak. Those people can be concerned with procedure, but even when substance is deeply affected (as in the commitment of juvenile delinquents or the mentally ill, say) the legal profession does not forfeit its eminence.

In typical cases, however, lawyers for the man deprived of life, liberty, or property may share too little of their whole profession's lore; lawyers for the Government, too much. Should not courts insure a better balance by seeking from the profession aids to wisdom that the bar as a whole (lawyers and professors) could provide?

The best discussion of extra manpower that I know is Karl Llewellyn's; and his comments on the lower courts and counsel, the judge's law clerk, and outside experts merit attention.[61] I wish he himself had given more attention to the amicus brief. "[R]equesting or inviting, on occasion, an amicus brief * * * has been little institutionalized," he says, "and if institutionalized unwisely it could turn into an abuse; but the idea has much merit, for occasional use, especially when light is needed on situations technical and relatively unfamiliar to the court." [62]

He wrote mostly of private law. With regard to due-process law, for which the bar has a unique bent, should we be so cautious? A flood of amicus briefs might rub rawly too many sensitive issues in commercial law, perhaps, or all constitutional law. But one of these days we will have to face up to the arbitrariness and need for a right to petition and right to be heard in judicial lawmaking,[63] and is not due process a fertile first field for experiment and expansion?

Why should not lawyers and law professors—individually, for clients, for ABA, AALS, ACLU, and other groups, for governments—articulate via amicus briefs a concern with due process procedure law that matches their variously demonstrated concerns with all other forms of procedure law? We have taught ourselves that committee reports and scholarly writings, alone, do not sufficiently influence lawmakers and that reform activity, to be fruitful, has to be packaged efficiently. For courts is not the best package—comparable to appearance at a legislative or rulemaking hearings or an office conference with legislators or administrators—the amicus brief?

What would such briefs add? The writers could be lawyers whose interest was not confined to (1) this particular case, or (2) ensuring victory for the Government in this and similar cases. Their contribution could reflect some of that maturing of collective thought which perhaps cannot be assured by the Bench itself.[64] They could test counsels' arguments for compliance with the cheklist (which thereby would become sharper, more complete, more useful). They could supply the breadth of view we need to expose privilege doctrines, too pervasive criminal trial analogies, and other doctrinal dead ends. Their ideas would not be molded to victory or defeat,[65] and their grand strategy less likely would involve aims extraneous to due process.[66] They could also focus for courts' attention some rather good ideas in legal writings that now, too often, are entombed. (In Hannah the opinions cite none of the leading texts or articles on cross-examination, and only one of the scores of recent articles that discuss investigating committee procedures.)

Those are potential gains, speculative but not insignificant. They might call for some management planning, though by no means do I recommend any souped-up, centrally controled, amicus brief filing body.[67] Free enterprise and sometimes even brashness are to be encouraged (which, incidentally, may require for academic life a vigilance to be sure that young teachers do not write articles instead of briefs merely to get their publish-or-perish credits).

CONCLUSION

In short, the due-process process calls for alertness as to the deficiences of both doctrine and mechanics. It calls for awareness that the job of whittling away at those deficiencies is too vast for nine Justices. Reforms that a thousand others of us must effect are needed, and an expanded amicus tradition might be one useful reform.

The Justices bear some responsibility. When parties' briefs are insufficient postponements can be ordered; and there are many precedents where the attorneys have been directed to discuss Court-framed questions, where agencies have been asked to interpret documents or describe their practices, where comments of independent counsel have been sought. The Court might even impose some minimum standards for due process advocacy, to insure that lawyers do not ignore items on a checklist or that they detail their quarrels regarding fact (adjudicative and legislative) as well as the law theories they espouse. Especially, the Court should not jeopardize its own due process by restrictive application of its amicus rules.[68] It is not a committee of Congress, and it owes no duty of graciousness to all advocates who may wish to file or read statements. It is part of "the Government," nonetheless, and "to petition the Government" for better due process (whether or not a first amendment right) is a right the Court surely should encourage when its own work might profit.

A final word relates to social significance. With respect to procedure law in general, it can be argued that appellate courts are not the best forum for reform and that reformers' limited energies, therefore, sholud be aimed at revised statutes, revised regulations, revised court rules. That is certainly true as to civil procedure and a great deal of criminal and administrative procedure. The big regulatory agencies, for example, rarely have any due process troubles; and a whole new Administrative Procedure Act can be drafted with only minor reference to the rules of due process.

There are immense areas of government, however, where much law is due process law—where crucial statutes, regulations, and rules are either nonexistent or unconstitutional. Many criminal proceedings, loyalty-security proceedings, mental health proceedings, traffic court, juvenile court, and family court proceedings illustrate the point. The officials engaged in those activities are not constantly perturbed by due process opinions, but there is ample evidence that those opinions do have an enormous impact.[69]

---

[60] I have been advised that the Government lawyers responsible for arguing the Hannah case were so set on victory that they sought out potential amici (who were contemplating the filing of a brief possibly like the Douglas-Black dissent) and persuaded them not to file.

[61] Llewellyn, "The Common Law: Deciding Appeals," 317–332 (1960). Some of the most objectionable language in the Court's Hannah opinion was inspired by pp. 18 and 35 of the Government's brief. See text preceding note 10, supra.

[62] Llewellyn, "The Common Law: Deciding Appeals," 323 (1960).

[63] See Weintraub, "Judicial Legislation," N.Y.L.J., Mar. 19, 1959; cf. *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 571–572 (1960) (dissenting opinion); *Wyatt* v. *United States*, 362 U.S. 525, 535 (1960) (dissenting opinion); *NLRB* v. *E. & B. Brewing Co.*, 276 F. 2d 594 (6th Cir. 1960); George R. Currie, "Appellate Courts Use of Facts Outside of the Record by Resort to Judicial Notice and Independent Investigation," 1960 Wis. L. Rev. 39.

[64] Cf. Hart, foreword, "The Time Chart of the Justices," 73 Harv. L. Rev. 84 (1959).

[65] While preparing a mock petition for rehearing in the Hannah case I discovered that my avowed "concern for rationality in the law of due process" was consistent with neither appellants' nor respondents' aims. Both sides would have opposed my suggested conclusion. See Newman, supra, note 7.

[66] In the cold war now being waged on desegregation and other racial issues, what really are the stakes in a dispute regarding technicalities of the procedure of one not very powerful Federal investigatory agency?

[67] Cf. Freedman, "Promoting the Public Welfare: A Proposal for Establishing a People's Advocate," 43 A.B.A.J. 211 (1957); Kadish, "Methodology and Criteria in Due Process Adjudication—A Survey and Criticism," 66 Yale L. J. 319, 363 n. 198 (1957) (references to "a research body which would make determination of constitutional facts").

[68] Cf. *Knetsch* v. *United States*, 81 S. Ct. 132, 137 (1960) ("Some point is made in an amicus curiae brief of the fact that * * * [petitioner] in entering into these annuity agreements relied on individual ruling letters issued by the Commissioner to other taxpayers. This argument has never been advanced by petitioners in this case. Accordingly, we have no reason to pass upon it."). Would more flexibility on rehearings be desiderable? Cf. Louisell and Degnan, "Rehearing in American Appellate Courts," 44 Calif., L. Rev. 627 (1956). Generally, see Swisher, "The Supreme Court and the 'Moment of truth,'" 54 Am. Pol. Sci. Rev. 879, 884 (1960).

[69] Two years ago, reviewing the Davis "Administrative Law Treatise," I stated that "Agency rule makers and adjudicators do pay considerable attention to statutes, but if Professor Davis believes they are regularly influenced by Supreme Court opinions I be-

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

Yet even more critical than an impact on administration is the impact on reform itself. We tend to regard due process opinions mostly as warnings to policemen or trial judges or agency officials—telling them what appellate courts won't let them do. Those warnings themselves effect many reforms. (E.g., "We'd better change the rules, because Olympus says we're not supposed to do that anymore.") The greater effect, though, pertains to statutes, regulations, and rules that are new and more comprehensive.[69] Reformers of those less explored proceedings I just mentioned (loyalty-security, traffic court, juvenile court, etc.) do not only inquire "What must we avoid to keep the new procedures constitutional?" They also ask, "For ideas as to procedure why don't we consider the due process precedents?" And often they add, "Why as a matter of policy should we require more than due process requires? For the cases tell us what is 'fair,' and who are we to seek more than fairness?" [70]

Hannah v. *Larche*, for example, reminds us that "due process embodies the differing rules of fairplay, which through the years, have become associated with differing types of proceedings." The proposals there rejected, we are told, "would make a shambles of the investigation and stifle the * * * gathering of facts." "[T]he investigative process could be completely disrupted. * * * Factfinding agencies * * * would be diverted from their legitimate duties and would be plagued by the injection of collateral issues that would make the investigation interminable." [71] Should reformers disregard those prestigious predictions? Or is it possible that the Court's inquiry in this single case may have greater effect on the whole course of investigatory reform than will a vigorous decade of scholarly research and writing?

The process of prescribing due process thus may even dominate reform. Efforts to improve its effectivensss could be widely rewarding indeed.

EXCERPT FROM "THE FEDERAL LOYALTY-SECURITY PROGRAM," BY ELEANOR BONTECOU, CORNELL UNIVERSITY PRESS (1953), AT PAGES 234; 235–236

From these confusing and conflicting opinions one can only conclude that the necessity of facing the ugly reality that there may be a threat on the one hand to our security, and on the other, to our freedoms, has presented very difficult problems to the courts as well as to all of us. Even the immediate practical effect of the Court's decision on the loyalty and security programs remains in doubt. * * * So far no doors have been closed and locked by decisions in the courts, and they never can be so long as the courts continue to exercise their function of weighing conflicting interests. Obviously the balance of the scales is subject to change. There are a number of paths, as yet untrodden, which may lead from loyalty-security cases to the courts. When and if new cases involving different issues come before them, the Justices will undoubtedly continue to pay great respect to the judgment of the Congress and the Executive, but it seems unlikely that they will abandon the position that the conditions imposed upon those who seek to gain or hold Government employment must be reasonable not arbitrary. * * * Already there are signs that the courts will not permit themselves to be barred from consideration of the real issues before them by the device of placing upon them the label "security." * * *

Obviously no one can now prophesy the course which the courts will finally take. Their exact direction may depend on such extraneous matters as change of personnel. As time goes on, however, they will surely have a clearer understanding than is now possible of the meaning of this new concept of security and of the role it is playing in the shaping of our institutions. Perhaps they will find that they are not really being asked to choose between the conflicting interests of individual freedom and national security but are dealing with different aspects of the larger problem of national security. They may then decide that the maintenance of our traditional freedoms and our traditional respect for fairness is as necessary to our safety as a free nation, as are the forging of secret weapons and the raising of armies.

Mr. Speaker, it is in this spirit that I oppose the bill as it comes before us today—under suspension procedures which permit no amendment or adequate time for debate—in the hope that we may continue to find ways, through flexibility, imagination and procedural experimentation, to insure that in the land of the free we can have both security against internal threats, and the guarantee of individual freedom.

Mr. LINDSAY. Mr. Speaker, I yield 3 minutes to the gentleman from California [Mr. ROOSEVELT].

(Mr. ROOSEVELT asked and was given permission to revise and extend his remarks.)

Mr. ROOSEVELT. Mr. Speaker, when this bill was called on the Consent Calendar on August 20 I objected to its passage because I thought there were serious objections to the bill. Now it is before us under a procedure that prevents amendments.

After further consideration I have concluded that adoption of H.R. 12082 would be a serious error, unless some amendments were adopted. The Members of this House should be alerted to the infirmities and dangers of this legislation.

Briefly stated, H.R. 12082 would amend the Internal Security Act of 1950 by requiring a full field investigation prior to the employment of any person by the National Security Agency, and by giving the Secretary of Defense the power to summarily terminate the employment of any officer or employee of the Agency whenever he deems such action to be in the interest of the United States, and when he has determined that the ordinary procedures for terminating employment cannot be invoked consistently with national security. Under this legislation such action by the Secretary would be final and unreviewable.

I do not of course question the sensitivity of the National Security Agency nor the need for legislation clarifying and strengthening the Agency's security procedures. This need was shown when, in June of 1960, two employees of the Agency defected to the Soviet Union.

One part of H.R. 12082 provides for a full field investigation before a person may be employed by the National Security Agency. No objection can be made to this provision. But what can and should be objected to are those provisions of the bill which give the Secretary of Defense complete and arbitrary power to discharge an Agency officer or employee whenever the Secretary thinks it is in the public interest to do so without granting the employee a hearing, the right to confront his accusers, the right of appeal, or even the right to know the nature of the charges which have led to his dismissal. The bill does state that such dismissal can only take place when the Secretary has determined that the ordinary procedures for terminating employment cannot be invoked consistently with national security. But the bill provides no standards to guide the Secretary in making such a determination, and his judgment on this matter is final.

Not long ago the Supreme Court had occasion to comment on proceedings of this type in Greene against McElroy, a case in which the Department of Defense had revoked the security clearance of a man under the industrial security program without having granted him an opportunity to confront and cross-examine his accusers. The Supreme Court said this regarding such procedures:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the sixth amendment.

H.R. 12082 goes much further than the action of which the Supreme Court spoke since it not only denies suspected employees the right to face their accusers, but it eliminates all hearings and, therefore, all possibility of defending against unknown accusations. In addition it denies the discharged employee the basic right to appeal and even the right to know the nature of the charges made against him.

BOARD SETUP NOT EVEN REQUIRED TO PASS ON OR MAKE RECOMMENDATIONS

Supporters of this bill will argue, no doubt, that although the procedures it establishes are harsh and extraordinary they are warranted and indeed required by the demands of national security. Perhaps this is so, but before such unusual power is granted, the Members of this House should be convinced that national security not only demands such drastic legislation, but that it is impossible to evolve procedures which will equally protect national security and at the same time be consonant with traditional American notions of fair play. I do not believe that such is the case.

Why, for example, cannot the National Security Agency be equally protected by granting the Secretary of De-

---

lieve he is mistaken." Newman, "The Literature of Administrative Law and the New Davis Treatise," 43 Minn. L. Rev. 637, 642 (1959). I now believe that I was mistaken, assuming that (1) we do not overly stress the word "regularly," and (2) administrative law includes the whole sweep of government and not merely those proceedings that are the focus of most law practice before agencies.

[70] For a suggestion that officials sometimes are afraid to recognize more rights than due process demands see Rourke, "Law Enforcement Through Publicity," 24 U. Chi. L. Rev. 225, 253 n. 108 (1957).

[71] 363 U.S. at 442–444.

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

fense power to suspend temporarily a person suspected of being a security risk, or to shift such a person to a nonsensitive position within the Agency pending a final determination of his fitness? Under such an arrangement this final determination could then be made in the ordinary fashion with the employee being informed of the nature of the charges against him and having an opportunity to respond to such charges. In the meantime the Government would be protected because the employee would be denied access to classified information pending his final clearance. That such an arrangement is feasible is actually suggested by the bill as it now stands since one of its sections provides that conditional appointments can be made by the Secretary to positions without access to sensitive cryptologic information pending the completion of the full field investigations required by the bill.

Why, too, cannot an agency employee having been discharged and thereby removed from access to sensitive information be allowed to know the charges which have led to his dismissal and be allowed to appeal without national security being endangered?

I merely offer these suggestions tentatively. The important point to be made now is that legislation which enables a man to be thrown out of his job and branded a security risk without affording him such fundamental rights as a hearing or an appeal should not be enated without full hearing and debate and without a consideration of alternative possibilities.

I regret that this measure must be considered in this fashion today and I express the hope that the other body will either amend it or reconsider it next year.

Mr. LINDSAY. Mr. Speaker, I yield myself 1 minute.

Mr. Speaker, I am opposed to this bill, H.R. 12082, being considered under suspension of the rules. I would have at least two amendments to the measure which I would offer were this bill on the floor being considered under a rule. However, I think certain facts regarding this bill should be made clear. This bill does not even provide minimum due process. It does not provide for appeal. It does not provide for a hearing. I think that a bill involving fundamental questions as to the right of the Government under circumstances like this should be afforded ample time for debate. I may say I do not feel anywhere near as strongly about this bill as I do about the next bill in view of the fact that the impact of this bill in terms of numbers of individuals who might be involved is relatively very small.

The SPEAKER pro tempore. The gentleman from New York has consumed 1 minute.

Mr. LINDSAY. Mr. Speaker, I yield myself an additional 30 seconds.

The SPEAKER pro tempore. The gentleman is recognized.

Mr. LINDSAY. In view of the circumstances, since no amendments may be offered and the debate is so limited, I would be constrained to vote against this bill should we have a rollcall vote on Wednesday.

(Mr. LINDSAY asked and was given premission to revise and extend his remarks.)

Mr. LINDSAY. Mr. Speaker, I yield 5 minutes to the gentleman from Michigan [Mr. JOHANSEN].

Mr. WALTER. Mr. Speaker, I yield the remainder of my time, 3 minutes, to the gentleman from Michigan.

The SPEAKER pro tempore. The gentleman from Michigan is recognized for 8 minutes.

(Mr. JOHANSEN asked and was given permission to revise and extend his remarks.)

Mr. JOHANSEN. Mr. Speaker, I thank the gentleman from Pennsylvania for the additional time, and I thank the gentleman from New York for yielding to me.

It could be said, I suppose, that this legislation—and I rise, of course, in support of H.R. 12082—represents an effort to lock the barn door after the horse is stolen insofar as it is unfortunately not retroactively beneficial in respect to the Martin and Mitchell cases. But I remind the House that there are other barn doors and other locks that are desperately needed, and it is to furnish those locks with respect to sensitive agencies that this legislation has been voted out by the House Committee on Un-American Activities.

I want particularly to stress the fact, as a minority member of the committee, that this was a unanimous vote and that it does have the complete support of the membership of the committee.

In view of the emphasis that has been made by the critics of this legislation respecting section 403(a) relating to termination of employment, I should like to set the record straight by reading the provisions of this section.

It reads:

SEC. 403. (a) Notwithstanding section 14 of the Act of June 27, 1944, chapter 287, as amended (5 U.S.C. 863), section 1 of the Act of August 26, 1950, chapter 803, as amended (5 U.S.C. 22-1), or any other provision of law, the Secretary may terminate the employment of any officer or employee of the Agency whenever he considers that action to be in the interest of the United States, and he determines that the procedures prescribed in other provisions of law that authorize the termination of the employment of that officer or employee cannot be invoked consistently with the national security. Such a determination is final.

Mr. SCHERER. Mr. Speaker, will the gentleman yield at that point?

Mr. JOHANSEN. I am glad to yield.

Mr. SCHERER. Under present law does not the head of the Central Intelligence Agency and the head of the Atomic Energy Commission have the same right to dismiss summarily?

Mr. JOHANSEN. The gentleman, of course, is correct, and that point was stressed by the chairman of the committee.

Mr. SCHERER. And is not NASA as sensitive as, if not more sensitive than the Atomic Energy Commission or the Central Intelligence Agency

Mr. JOHANSEN. There is no doubt about it; but I should like to stress the fact that the exercise of the prerogative of summary dismissal does not represent the only or even the customary procedure for termination of employment of personnel. It is a reservation of discretionary authority in those cases in which the Secretary specifically determines that it is not in the interest of national security that those procedures be followed.

Mr. COHELAN. Mr. Speaker, will the gentleman yield?

Mr. JOHANSEN. I yield.

Mr. COHELAN. I wonder if the gentleman can tell me the standards the Secretary has been directed to employ in making such determination?

Mr. JOHANSEN. The basic standard that is set forth in this legislation is the matter of the interest and the security of the United States. I do not yield further at the moment.

The simple fact of the matter is that if we are going to have effective safeguarding of national security and the secrets that involve national security, there must, of course, be discretionary authority vested in certain specified individuals. The alternative, of course, is to handcuff and shackle them in instances in which clearly the security of the nation is involved if the normal and standard procedure were to be followed.

It seems to me the gentlemen who are opposing this bill are fighting a 14-year-old battle. This same issue was resolved in connection with the Atomic Energy Commission and in connection with the Central Intelligence Agency, and they are now trying to win a battle which I think has been fought not on the floor of the House but a battle which has been fought in the courts and in which the right and necessity of this sort of authority has been abundantly asserted.

I should like to stress again—and I have no hope of matching the ability and the eloquence with which the chairman of the committee has stressed the point—that what is being claimed by opponents of this bill is an alleged legal right to have access either to employment by this agency or to have access to secrets that involve the basic security of the United States. Of course, we come down to a question of how far we can allow unrestricted freedom to be used by the enemies of freedom to destroy freedom itself. Certainly that must be preserved to the Government, and I know of no way it can be preserved without giving the official agents of the Government the right to exercise discretion when clearly in their judgment and on the basis of the facts known to them it is obvious that normal procedures cannot be followed consonant with the national security.

Mr. GRIFFIN. Mr. Speaker, will the gentleman yield?

Mr. JOHANSEN. I yield to the gentleman from Michigan.

Mr. GRIFFIN. I thank the gentleman for yielding. I wish to commend my colleague from Michigan for his work on this legislation and associate myself with his remarks.

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5

I was interested in the theory and argument presented by the first gentleman from California [Mr. COHELAN], for whom I have a high regard. He argued that constitutional protections afforded to "rights" should now be extended to mere "privileges." This is an interesting academic theory and perhaps it should be debated at great length. But it is a new and far-reaching concept. In attempting to make such an extension, I suggest that my colleagues not start with the National Security Agency or the Central Intelligence Agency. Let them make this kind of an argument first with respect to Government employees in areas which do not involve the secrets of our Government.

Mr. JOHANSEN. I concur in what the gentleman from Michigan has said. Certainly this may be a very interesting academic question to argue out behind the Communist barbed wire and in Communist concentration camps if we do not provide the necessary security for this country.

Mr. COHELAN. May I say to the gentlemen from Michigan, that the due-process question is by no means academic. There must be, and there are ways, as cited by Prof. Frank Newman and many other authorities in this field, that appropriate due-process procedures can be worked out within the programs of all agencies, including the highly sensitive National Security Agency.

Mr. GROSS. Mr. Speaker, will the gentleman yield?

Mr. JOHANSEN. I yield to the gentleman from Iowa.

Mr. GROSS. I notice that two more Russian spies, or whatever you want to call them, have been rooted out of the United Nations. And I notice announcement of this spy activity did not come from Attorney General Kennedy until after the phony U.N. bond issue was safely passed.

Mr. JOHANSEN. I was impressed with the timing, too.

Mr. GROSS. Can the gentleman tell me if this bill will do anything to help root espionage agents out of the United Nations?

Mr. JOHANSEN. This bill does not address itself to the United Nations.

Mr. GROSS. I am sorry it does not.

Mr. JOHANSEN. Unfortunately, we cannot resolve all the problems in one bill.

Mr. LINDSAY. Mr. Speaker, I yield the remainder of the time on this side to the gentleman from New York [Mr. RYAN].

(Mr. RYAN of New York asked and was given permission to revise and extend his remarks.)

Mr. RYAN of New York. Mr. Speaker, I rise in opposition to H.R. 12082. Rather than this being a 14-year-old battle, as the previous speaker, our colleague from Michigan, suggested, this is a centuries-old battle. One hundred and seventy-five years ago today the Constitution of the United States was approved and signed by the Constitutional Convention. Civil liberties were destined to gain further protection through the adoption of the Bill of Rights. Yet, the battle has continued through the years.

There are fundamental constitutional questions involved in any procedure which would give the power of summary dismissal to the Secretary of Defense. That is what this bill does. It is brought before us under a procedure under which we cannot offer amendments.

H.R. 12082 will permit the Secretary of Defense to fire employees of the National Security Agency if he, and he alone, decides that an employee is a possible danger to "the national security." This is, to say the least, a broad and very vague standard.

Section 403 of the bill authorizes the Secretary of Defense summarily to terminate the services of Agency employees "whenever he considers that action to be in the interest of the United States" and that procedures prescribed in other provisions of law providing for such cases cannot be invoked "consistently with the national security." The section provides that "such a determination is final."

This bill attempts to throw a sop to the employee who finds himself thrown out of a job for reasons entirely unknown and unknowable; he is told that he may go to the Civil Service Commission and present himself for other Government employment. Branded under the procedures of this bill as unfit to handle his country's interests, what would his chances be of getting other Government employment? How would he explain the situation to a prospective private employer?

According to the committee report, this bill is before us because of two dubious characters employed by the National Security Agency who suddenly disappeared into Russia. I fail to see how this would have been prevented even if this bill were law.

On September 4 I pointed out that this bill does violence to constitutional concepts and deprives U.S. citizens of due process of law. It gives the Secretary of Defense the authority to fire any employee of the National Security Agency without a hearing, without the right of cross examination, without the right to have any information against him, without the right to appeal, and without even the right to know why he is being fired.

I suggest that this proposal is inconsistent with the due-process provisions of the Constitution and Bill of Rights. I believe that the debate on the floor today is part of the battle which has gone on for centuries and which will continue, but we must at all times be vigilant to protect the rights of the individual.

The SPEAKER pro tempore. The question is on the motion of the gentleman from Pennsylvania that the House suspend the rules and pass the bill H.R. 12082.

The question was taken.

Mr. ROOSEVELT. Mr. Speaker, I object to the vote on the ground that a quorum is not present, and I make the point of order that a quorum is not present.

The SPEAKER pro tempore. Further proceedings on this matter will go over until Wednesday next.

Mr. ROOSEVELT. Mr. Speaker, I withdraw my point of order that a quorum is not present.

Mr. HALL. Mr. Speaker, I arise in support of H.R. 12082 and H.R. 11363. I believe I happen to be the only member present on the floor at this moment of a special subcommittee appointed by the distinguished chairman of the Armed Services Committee to look into and be briefed on the NSA recently. The subcommittee was chaired by Hon CLYDE DOYLE, of California, and Hon. CHARLES E. BENNETT, of Florida, also served. This was in connection with the expansion of construction and personnel at NSA headquarters. After an exhaustive briefing and tour, I personally was convinced and have withdrawn all objection in the interest of our Nation's security. Further, Mr. Speaker, based on this and other Armed Services Committee experiences, I am certain this body should pass these legislative bills today.

In addition—

First. I am working on, and have been considering and perfecting for over 16 months, a bill to truly outlaw communism in the United States of America. The FBI and the House Un-American Activities Committee are aware of this. We are not dealing with rights, but privileged information pertinent to our security in trying times. As a citizen, Army Reserve officer, and legislator who is fully cognizant of the pressure for personal and civil rights in this day and age, I am even more certain we should secure ourselves in every manner possible. We have had example enough of escapes with vital information and defection.

Second. The members, and myself in particular, of the Armed Services Committee have probably seen more classified equipment and been exposed to more classified construction—from communications through telemetry than most Members. The conclusion is inescapable, Mr. Speaker, we must protect such information through civilian contractors and others and put "teeth" in our action.

Finally, and generally, the "Frankenstein" of civil service tenure, due process, and leaning over backwards to protect persons and minority groups from the responsibilities of the Nation as a whole must stop, or we may in fact lose our representative government. It has been well said that there is naught wrong with our system of government, or bureaus therein; that the granted ability of our department heads or managers (directors, and so forth) to "fire," any three employees per year, would not cure. Of course in this area "due process" could and should ensue.

I hope our colleagues think deeply as to the security needs in a country where enemy agents can live and serve infamously on our magazines, news mediums, and other disclosures. Let us recall what Adm. H. Rickover, U.S. Navy, retired, pointed out about the toy, but dimension-built, submarines, compared to our Nation's FBM—ANP—submarines—Polaris. It is later than we realize.

Approved For Release 2003/10/10 : CIA-RDP64B00346R000300070001-5